82-1414
NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1982

PRATT-FARNSWORTH, INC., HALMAR, INC., NEW ORLEANS DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LA., INC., AT-LARGE DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LA., INC.,
Petitioner,

v.

CARPENTERS LOCAL UNION NO. 1846 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, ET AL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
VOLUME I

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QUESTIONS PRESENTED

1. Whether a district court has, in the first instance, authority to determine an appropriate bargaining unit.

2. Whether the Fifth Circuit Court of Appeals properly applied this Court's decision in *South Prairie Construction Co. v. Local 627, Int'l Union of Operating Engineers,* AFL-CIO, 425 U.S. 800 (1976) [*Peter Kiewit*] when it concluded that a district court has authority to determine whether two construction companies are a single employer, whether their employees are a single bargaining unit, and whether the union represents a majority of the employees in the single unit.

3. Whether the Fifth Circuit Court of Appeals properly applied this Court's decision in *Republic Steel v. Maddox,* 379 U.S. 650 (1965), *Vaca v. Sipes,* 386 U.S. 171 (1967) and other decisions when it held that attempted exhaustion of contractual remedies is a prerequisite to a suit under Section 301 of the Labor Management Relations Act, 29 USC §185(a) only if the contractually provided for remedies are mandatory.

4. Whether a union's claim that agreements between employers' associations and double-breasted construction companies injured the union in its business and weakened its ability to represent its members states a cause of action under the antitrust laws.

RULE 28.1 STATEMENT

Parties to this case are:

Carpenters Local Union, No. 1846 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO—Plaintiff

Carpenters District Council of New Orleans and Vicinity Pension Trust—Plaintiff

Carpenters District Council of New Orleans and Vicinity Health and Welfare Plan—Plaintiff

Carpenters District Council of New Orleans and Vicinity Apprenticeship Educational and Training Program—Plaintiff

William John Fortney, Kenneth J. Perkins, Donald C. Haynes, Rayford H. Colamari, Lothard J. Broussard, Sr., Franklin B. Hunter, Elaire Dauzat, Dennis J. Savoy, Lawrence J. Rousselle, Desire Bergeron, Vernon D. Harvey, and William J. Brignac, Jr.,—Plaintiffs

James E. Crawford, Lawless J. Martin, Robert Brown, Charles Mitchell, Nathaniel E. Williams, Johnnie Williams, Fred Scott and Lee R. Miskell—Plaintiffs

James E. Crawford, Lawless J. Martin, Robert Brown, Nathaniel E. Williams and Lee R. Miskell—Plaintiffs

Pratt-Farnsworth, Inc.—Defendant

Halmar, Inc.—Defendant

New Orleans District, Associated General Contractors of Louisiana, Inc.—Defendant

At-Large District, Associated General Contractors of Louisiana, Inc.—Defendant

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DISTRICT, ASSOCIATED GENERAL
CONTRACTORS OF LA., INC.,
AT-LARGE DISTRICT, ASSOCIATED
GENERAL CONTRACTORS OF LA., INC.,

Petitioner

V.

CARPENTERS LOCAL UNION NO. 1846
OF THE UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, ET AL,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Pratt-Fransworth, Inc., Halmar, Inc., New Orleans District, Associated General Contractors of La., Inc., and At-Large District Associated General Contractors of La., Inc. respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Carpenters Local Union No. 1846, et al v. Pratt-Farnsworth, Inc., et al*, No. 81-3222, 690 F.2d 489 (5th Cir. 1982), Rehearing and Rehearing En Banc denied __ F.2d __.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 511 F.Supp. 509 (E.D. La. 1981), and appears as Appendix "C" hereto. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 690 F.2d 489 (5th Cir. 1982), and appears as Appendix "A." The Petition for Rehearing and Suggestion for Rehearing En Banc were denied without opinion and appear as Appendix "B".

JURISDICTION

Jurisdiction of the court of appeals was entered on November 4, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant statutory provisions are:

1. Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a).

2. Sections 9, 10(e) and 10(f) of the National Labor Relations Act, 29 U.S.C. §§159, 160(e), and 160(f).

3. *Inter alia*, The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq.

4. Sections 6 and 20 of the Clayton Antitrust Act, 15 U.S.C. §17, 29 U.S.C. §52.

5. Sections 1, 2, and 3 of the Sherman Antitrust Act, 15 U.S.C. §§1-3.

6. Sections 1, 7, and 13 of the Norris LaGuardia Act, 29 U.S.C. §§101, 107, 113.

Pertinent portions of these statutory provisions are reproduced as Appendix "D."

STATEMENT OF THE CASE

The Associated General Contractors of La., Inc. is a trade organization consisting of various construction companies throughout Louisiana. It is divided administratively into several geographical districts. The New Orleans district (hereinafter "AGC New Orleans") is named as a defendant herein. Also a defendant is the At-Large District which is not limited to any geographic area (hereinafter "AGC At-Large").

Pratt-Farnsworth, Inc. is a construction company in the New Orleans area, a member of the AGC New Orleans and a defendant herein. Haimar, Inc. is also a construction company in New Orleans, a member of the AGC At-Large, and a defendant herein.

One of the activities conducted by the AGC New Orleans is to negotiate collective bargaining agreements on behalf of certain of its members with local building trades unions. The AGC New Orleans is not itself a signatory to these collective bargaining agreements; rather, the agreements are signed by member contractors, as well as certain nonmember contractors, who wish to be bound thereby.

Collective bargaining agreements were negotiated by the AGC New Orleans for the period May 1, 1971 to April 30, 1974; May 1, 1974 to April 30, 1977; and May 1, 1977 to April 30, 1980. These collective bargaining agreements are the subject of the instant lawsuit. Of all the named Defendants, only Pratt-Farnsworth is a signatory to these contracts.

The complaint alleges that Pratt-Farnsworth and Halmar are a "single employer" and, consequently, contributions to various trust funds are due from both employers under the agreement signed solely by Pratt-Farnsworth. Failure to contribute on behalf of Halmar's employees is the basis for the actions under §301 of the Labor Management Relations Act and ERISA.

The third cause of action alleges that by operating as a "double-breasted" construction company and by encouraging others to do so, all four defendants acted in restraint of trade, thus violating the Sherman and Clayton Antitrust Acts. The complaint is reproduced as Appendix "E."

The district court granted the Motions for Summary Judgment of all defendants. On appeal, the Fifth Circuit upheld the dismissals of AGC New Orleans and AGC At-Large from the §301 suit and the ERISA action. The Fifth Circuit further ruled that as to Halmar and Pratt-Farnsworth, the §301 suit and the ERISA action should be remanded to allow the Plaintiffs the opportunity to attempt to establish: (1) that Halmar and Pratt-Farnsworth are a single employer and that their employees constitute a single bargaining unit, or (2) that Halmar is the "alter ego" of Pratt-Farnsworth, and thus the collective bargaining agreement applies to both parties.

With regard to the antitrust allegations, the Fifth Circuit held that Plaintiffs might be successful in their action under two possible theories. However, it is not clear that Plaintiffs had standing to bring these antitrust actions, so the case was remanded for a ruling on the standing issue after full development of the facts by the parties.

REASONS FOR GRANTING THE WRIT

I. *THE DECISION ALLOWING A UNITED STATES DISTRICT COURT TO DETERMINE, IN THE FIRST INSTANCE, AN APPROPRIATE BARGAINING UNIT IS WRONG.*

A. *The Decision Is Contrary To Supreme Court Precedent.*

Section 9(b) of the National Labor Relations Act, 29 U.S.C. §159(b) gives to the National Labor Relations Board the exclusive authority to determine what unit is appropriate for collective bargianing, stating, "the Board shall decide *in each case*...the unit appropriate for the purposes of collective bargaining...."

The Supreme Court has long held that determination of an appropriate unit is a function reserved, in the first instance, to the Board and not to courts. This determination involves a weighing of highly detailed and sometimes minute facts, best suited to an administrative inquiry by an expert agency rather than a judicial tribunal. Yet, this decision not only invites a district court to determine whether or not a unit is appropriate, but whether or not unions enjoy majority status. 690 F.2d 489, 523.[1] How is this to be done?

[1] This case is thus, in some respects, similar to *Jim McNeff, Inc. v.*

Is the district court to hold an election? If so, will all the traditional safeguards of a Board conducted election be observed? Will there be a pre-election conference? Will adverse rulings be appealable to the Board? Who would be sent to monitor such an election, and where would it be conducted? Who would count the ballots? Would the district court's rulings constitute interlocutory orders from which no appeal is allowed? Perhaps the district court could check "showing-of-interest cards" submitted by a union, or appoint a magistrate to do so. Or perhaps, the district court could determine majority status by taking testimony from bargaining unit members, asking each of them to state in open court, for the record, whether they do, or do not, support the union. Would the employees then be subject to cross-examination on their desires? The difficulties involved in such an undertaking are profound and of tremendous import. They merit this court's immediate attention.

One case frequently relied upon for the proposition of Board supremacy in this area is *South Prairie Construction Co. v. Local 627, Int. Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976) [*Peter Kiewit*]. In that case, the Board had decided that the two operations in a "double-breasted"[2] construction entity were separate employers. The Court of Appeals reversed, finding the companies to be a single employer, and the employees a single bargaining

(Footnote 1 continued)
Todd, 667 F.2d 800 (9th Cir. 1982) which is currently pending before this court (No. 81-2150). There, however, the question centers around the enforceability of pre-hire agreements prior to the union's achieving majority status—not, as here, which forum shall determine that majority status.

[2] A construction operation in which a single enterprise operates two separate and distinct companies, one union and the other nonunion.

unit. The Supreme Court reversed on this issue stating that for the Court of Appeals to "take upon itself the initial determination of this issue was 'incompatible with the orderly function of the process of judicial review.' " 425 U.S. at 805. The Court went on to hold:

> Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed,' *Packard Motor Co. v. NLRB*, 330 US 485, 491, 91 L.Ed. 1040, 67 S.Ct. 789 (1947), we think the function of the Court of Appeals ended when the Board's error on the 'employer' issue was 'laid bare.' *FPC v. Idaho Power Co.*, 344 US 17, 20, 97 L.Ed. 15, 73 S.Ct. 85 (1952).

425 U.S. at 805-806.

The Fifth Circuit distinguishes *Peter Kiewit* by asserting that it was decided along administrative law, rather than labor law, lines. They assert that the sentence regarding the discretion of the Board in these matters is often quoted "out of context" and does not stand for the proposition that the Board has exclusive jurisdiction to decide bargaining unit issues.

Since the sentence contains a quote from a previous Supreme Court case, putting the sentence "in context" requires a review of that earlier case. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947), involved a decision by the Board which defined foremen as "employees" under the protection of the Act and allowed them the right to organize and bargain collectively with their employer. The Sixth Circuit entered judgment enforcing the Board's Order. The Supreme Court affirmed, describing how appropriate bargaining units are to be determined:

> The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, *and none should be by decision.* It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, *our power is at an end.*
>
> . . .
>
> Whatever special questions there are in determining the appropriate bargaining unit for foremen *are for the Board,* and the history of the issue in the Board shows the difficulty of the problem committed *to its discretion.*

330 U.S. at 491-493 (emphasis supplied).[3]

It is respectfully submitted that *Peter Kiewit* has been misapplied by the Fifth Circuit.

Another way in which this decision bypasses the mandate of *Peter Kiewit,* is by casting the case (correctly) as a §301 contract action, to which the representation question is merely peripheral; then analogizing to the situation

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[3] The result in *Packard* (that foremen enjoy the protection of the Act) was, of course, legislatively overruled by Congress when it amended the Act. The essential holding of *Packard,* however, remains good law. The Supreme Court has reiterated the philosophy of Board supremacy regarding representation questions in other contexts. *N.L.R.B. v. Bell-Aerospace Co.,* 416 U.S. 267 (1974) (managerial employees); *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 171 (1971) (retired employees; Board's order denied enforcement); *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.,* __ U.S. __, 70 L.Ed.2d 323 (1981) (confidential employees).

in which a district court does have jurisdiction over a §301 action to which an unfair labor practice is peripheral.[4] Citing such Supreme Court cases as *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *Smith v. Evening News Assn.*, 371 U.S. 195 (1962), the court reasoned that if district courts have jurisdiction to decide unfair labor practices that are under the "exclusive" jurisdiction of the Board, they also have jurisdiction to decide representation questions which are also under the "exclusive" jurisdiction of the Board.

The difference between the two situations is manifest and embedded in the very heart of the National Labor Relations Act. Sections 10(e) and 10(f), 29 U.S.C. §160(f), provide specifically for court review of unfair labor practices. The Board's orders are not even self-enforcing—they *must* be brought to an appropriate court of appeals for enforcement. There is no such provision regarding representation questions. To the contrary, the Board's decisions regarding such issues as unit placement, majority status, jurisdiction, and so forth, are not only exclusive, but *unreviewable* in any court. The only way such matters ever come to the attention of a court of appeals is through a subsequent unfair labor practice proceeding in which the representation issue becomes part of the record. *Magnesium Casting Co. v. N.L.R.B.*, 401 U.S. 137 (1971).

Thus, the policy favoring judicial enforcement of collective bargaining contracts is strong enough to sustain the jurisdiction of district courts over §301 suits even though the conduct is also an unfair labor practice. It is not strong enough, however, to overcome the statutory mandate that it is the Board which decides representation issues.

[4] The pertinent text is found in Appendix "D".

A further underpinning of the decision was *Connell Construction Co. v. Plumbers Union, Local 100,* 421 U.S. 616 (1975), in which the Supreme Court held that federal courts may decide labor law questions that emerge as "collateral issues" in suit brought under independent federal remedies, including the antitrust laws. From this, the panel reasoned that a federal court could also decide representational questions if they emerge as collateral issues to a §301 action.

That is an unwarranted extension of *Connell.* The specific holding in question is found at 421 U.S. 616, 626, and cites as support *Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965), *Vaca v. Sipes,* 386 U.S. 171 (1967), and *Smith v. Evening News Assn.,* 371 U.S. 195 (1962). By no reasonable stretch of imagination do those cases support the proposition that a federal court may, in a §301 suit, initially determine representational issues.

At issue in *Jewel Tea,* was a union-imposed restriction on hours of operations of meat departments. This had a substantial anticompetitive impact on unionized groceries. The Meat Cutters Union asserted that the hours restriction was a mandatory term or condition of employment and, therefore, the Board possessed exclusive jurisdiction to determine its legality. The Supreme Court rejected that argument, stating three reasons. First, although classifying bargaining subjects and "terms or conditions" of employment may be one of the Board's most common functions, it is not an inquiry for which the Board is *uniquely* suited—courts must make the same determination in other contexts. Second, the conspiracy as originally alleged in *Jewel Tea* made no mention of terms or conditions of employment. It was only at trial that this became important. Thus, when the suit was brought the issues

were framed so that a Board determination would be of "subsidiary importance" to the case's disposition. Third, Board procedures presented no available means to invoke jurisdiction—the Union would not raise it because it agreed with the contract, and the Company could not raise it because the six-month statute of limitations had run.

These observations are not pertinent here. The Carpenters Union may file refusal to bargain charges against Halmar and Pratt-Farnsworth if it wishes. Board procedures are fully open at this stage.[5] Also, this lawsuit and the potential unfair labor practice proceeding do not involve different spheres of federal law; any determination the Board might make would certainly be of much more than subsidiary importance to the §301 suit. Finally, the Board, which was created to rule on representation questions, can be said to be uniquely qualified to determine this issue.

In *Vaca v. Sipes*, this Court held that an employee's suit against a union for breaching its duty of fair representation is not barred merely because that breach is also an unfair labor practice. This was a necessary and common sense decision in light of the fact that the concept of fair representation is not found in the National Labor Relations Act. It is purely a judge-made and court-fashioned remedy. The Court in *Vaca*, chided the Board for its "tardy" assertion of jurisdiction in fair representation cases. Again, the Board could hardly be said to be *uniquely* qualified to determine breach of fair representation cases.

[5] The fact that they may also be open to the Defendants, as pointed out in the decision, is irrelevant. The Defendants should not be forced to file a unit clarification petition if they are content with the unit as it currently exists.

Smith v. Evening News Assn. was the original case in which the Supreme Court first held that courts may hear claims under §301 even though the same claims could be asserted in unfair labor practice proceedings.[6] The Court noted the Board sometimes declined to exercise its unfair labor practice jurisdiction when the parties had chosen arbitration. 371 U.S. at 198 note 6.

But that situation is, again, not analogous to the situation at bar. Arbitration decision are reviewable if they deal with rights protected by the NLRA, and are reviewable by courts regardless of their subject matter. A district court unit determination as called for in *Pratt-Farnsworth* would be unreviewable by the Board.

Finally, the reasoning that courts may decide representation issues which are peripheral to a §301 action misapprehends the true nature of this lawsuit. The desire of the union to represent, bargain for, and obtain contributions to the pension funds on behalf of the currently unrepresented employees of Halmar, is not peripheral to this lawsuit—it is the very heart and soul of this lawsuit. The proper forum therefore, is the one Congress has designated to handle such questions, the National Labor Relations Board.

B. *The Decision Conflicts With The Decisions Of Other Circuit Courts Of Appeals*

No circuit court of appeal has reached the same con-

[6] As part of its rationale, the Supreme Court relied upon the views of the Board, which had filed an *amicus curiae* brief, asserting that ousting the courts of jurisdiction under §301 in this case would not only fail to promote, but would actually obstruct, the purposes of the Labor Management Relations Act.

clusion as the Fifth Circuit in this case, and several have ruled to the contrary.

The clearest and most distinct conflict with *Pratt-Farnsworth* is *Teamsters, Local 70 v. California Consolidators, Inc.* 693 F.2d 81 (9th Cir. 1982). There the Teamsters represented the employees of Marathon Delivery Services. They sought to show in a §301 action that Marathon was a single employer with California Consolidators, Inc. The Ninth Circuit, in light of the *Peter Kiewit* decision held, correctly, that while §301 grants a district court jurisdiction to decide whether employers constitute a single employer, it does not extend to the second part of the issue, the appropriateness of the bargaining unit. This relief is "a representational question reserved in the first instance to the Board." 693 F.2d at 84.

California Consolidators, presents the conflict in its purist form, shorn of any side issue which could possibly distinguish it from the Fifth Circuit's contrary ruling in *Pratt-Farnsworth*. There are several other cases, however, which, using the same reasoning as *California Consolidators*, come to the same conclusion in slightly different factual settings.

In *Local No. 3-193 Int'l Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) a union and a company agreed to a contract covering a single operation. The employer then acquired several other operations but refused to recognize the union as having jurisdiction over these operations under the bargaining agreement. The union sought court enforcement of an accretion clause in the contract which the district court dismissed.

On appeal, for the first time, the jurisdictional issue was raised. Apparently *sua sponte*, the Ninth Circuit suggested "the District Court lacked jurisdiction under Section 301 because the issue here is in reality a representational issue, not a contract issue, and the National Labor Relations Act vests exclusive authority in the NLRB to pass on questions of representation." 611 F.2d at 1298.

In *Ketchikan* as in *Pratt-Farnsworth*, neither party saw fit to involve the primary jurisdiction of the Board. The Ninth Circuit refused to accept jurisdiction on this basis citing, ironically, the Fifth Circuit's holding in *West Point-Pepperell, Inc. v. Textile Workers Union*, 559 F.2d 304 (5th Cir. 1977), that NLRB jurisdiction in such a case is always exclusive. The Ninth Circuit did not rule that there could *never* be a situation in which the Board's authority was not exclusvie, but did hold that in the area of (1) the designation of exclusive bargaining agents, and (2) identification of appropriate collective bargaining units the Board's jurisdiction is "primary, if not exclusive."

The court also cited *Peter Kiewit* which it called "particularly illuminating." In analyzing that case, the Ninth Circuit held:

> This declaration of the strong policy of judicial deference to initial determination by the NLRB of representation issues is *equally applicable* to actions under Section 301. In the present case, the Union is attempting an end run around Section 9 of the Act and under the guise of contract interpretation wants to avoid self-determination of a bargaining agent by a substantial number of employees and the termination of an appropriate bargaining unit by the NLRB, which has primary authority in this area. This cannot be countenanced.

611 F.2d at 1299-1300, (emphasis added).

It is respectfully submitted that *Ketchikan* and *Pratt-Farnsworth* represent another split which cannot be reconciled. In both, unions attempted to bring representational issues to the attention of a district court under the guise of a contract interpretation dispute seeking damages for the loss of initiation fees and dues; in both, Board procedures were available, but unused.[7]

The Eighth Circuit dealt with this problem in *Local Union No. 204 of the Int'l Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982), and came to the same conclusion as the Ninth Circuit. In *Iowa Electric*, several employees who were not then members of an existing bargaining unit desired union representation. Pursuant to procedures in the collective bargaining agreement, the union petitioned the NLRB for accretion. The union was certified but *Iowa Electric* refused to negotiate, maintaining that the unit was not appropriate.

Instead of filing an unfair labor practice charge, as might have been expected, the union filed a grievance under the contract. When the company continued to refuse to discuss the matter on these grounds, the union filed suit under §301 for breach of the collective bargaining agreement.

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[7] Cf., *Jim McNeff, Inc. v. Todd*, 667 F.2d 800 (9th Cir., 1982) cert gtd. No. 81-2150—"Re-creation of past relationships for the purpose of resolving factual disputes is one of the traditional functions of a trial court, and not a process in which the N.L.R.B. has any extraordinary expertise. Therefore, in this opinion we do not extend the District Court's jurisdiction into an area in which the N.L.R.B. exericises *exclusive authority*." 667 F.2d at 804 (emphasis added)

The district court granted summary judgment to the plaintiff holding there was no genuine issue of material fact. On appeal, the Eighth Circuit concluded that before turning to the district court's analysis of the case, it must first answer the question of "whether a union representational matter, like that before this court, which is committed to the jurisdiction of the NLRB...may also serve as the basis for a §301 contract violation suit in the district court." 668 F.2d at 415-416. Unlike the Fifth Circuit in *Pratt-Farnsworth*, the Eighth Circuit answered that question in the negative.

The Eighth Circuit first pointed out that under *Smith v. Evening News Assn.*, the fact that a particular activity may constitute an unfair labor practice does not necessarily preclude the district court's jurisdiction under §301, but then continued,

> However, we are unable to find any case in which this rule has been held to apply to *representational* matters within the Board's jurisdiction under section 9....Instead, representational matters have been almost invariably processed administratively through the NLRB...with judicial review of the Board's determination by the courts of appeals under section 10 of the Act....[Citing *Ketchikan* and *Peter Kiewit*]

668 F.2d at 416 (emphasis added).

Again, ironically, the Eighth Circuit chose to cite the Fifth Circuit's *West Point-Pepperell* case when it held flatly that "a dispute over a representational matter is a situation calling for a denial of district court jurisidiction." *Id.* at 416. Had the Fifth Circuit also chosen to follow *West Point-Pepperell*, it too would have denied district court jurisdiction.

It is clear that like *Ketchikan*, *Iowa Electric* cannot be reconciled with the *Pratt-Farnsworth* decision. In both cases a union alleged a breach of a collective agreement by the company's "engaging in activity to defeat or evade the terms of the agreement." 668 F.2d at 413. In both cases, the union's desire to represent currently unrepresented employees underlies the genesis of the suit. In both cases, unfair labor practice proceedings were available, but unused. Yet in *Iowa Electric*, the court chose to echo the Ninth Circuit's characterization of the case as an attempt to bring an "end run" around provisions of the NLRA under the guise of contract interpretation under §301.

It is suggested that the Eighth Circuit's analysis of this area is a reasonable one. The court chose to draw a line between those cases where the district court has jurisdiction under §301 and those in which it does not, by examining the major issues to be decided. If the issues are primarily contractual, the district court should assume jurisdiction. If they are primarily representational, the district court should not. Under this analysis it is not necessary to determine whether the Board's jurisdiction is "exclusive" or "primary" in representational cases:

> **Regardless of whether NLRB jurisdiction under section 9 of the Labor Management Relations Act over representational issues like accretion to the existing bargaining unit is viewed as being exclusive or primary, it is clear that the district court in the instant case erred in concluding that it had jurisdiction to entertain this section 301 action.**

668 F.2d at 420.[8]

[8] It is especially important to note that in the *Iowa Electric* case,

Finally, the First Circuit's decision in *Int'l Assn. of Machinists v. Int'l Air Service of Puerto Rico, Inc.*, 636 F.2d 848 (1st Cir. 1980), contains dicta which indicates that the First Circuit is also in disagreement with the Fifth. In that case, an employer allegedly breached its contractual duty to notify the union when it hired various employees to perform services for airlines serviced by the company. The union maintained that these employees fell within the bargaining unit, and sought arbitration. The district court dismissed the case both on the merits of the grievance, and because it did not have jurisdiction over a "controversy of representation" which falls under the jurisdiction of the Board.

The First Circuit held first that the district court should not have reached the merits of the grievance. As to the jurisdictional issue, the court agreed that it was possible to construe this as a representational question and representational questions were "committed exclusively to the Board." 636 F.2d at 848. However, the court went on to analyze the strong labor policy which supplies a preference for interpreting questions as arbitrable in such a situation.

Nevertheless, it seems clear that under this theory, and this reasoning, the First Circuit, if presented with a question such as that in *Pratt-Farnsworth*, would rule consistently with its *Air Service* holding, that the Board has

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(Footnote 8 continued)
the National Labor Relations Board is in accord. It filed an *amicus curiae* brief urging that the sound formulation of national labor policy requires that the Board have primary jurisdiction over representational matters and that the district court has no jurisdiction to review the Board's decision in a representational proceeding or to decide these issues *de novo*.

primary jurisdiction of representational questions and courts should not decide them under the guise of a §301 action. See also, *Kessler Institute for Rehabilitation v. N.L.R.B.*, 669 F.2d 138 (3d Cir. 1982) ("we are not free to circumvent the Board's jurisdiction to make the initial determination on the merits"); *Computer Sciences Corp. v. N.L.R.B.*, 677 F.2d 804 (11th Cir. 1982) (interprets *Peter Kiewit* as holding "primary jurisdiction of Board to determine appropriate bargaining unit precludes court of appeals' determination of question in the first instance"); *Oil Chemical & Atomic Workers Int'l Union v. Standard Oil Co.*, 529 F.Supp. 184 (N.D. Ill. 1982), and *Couchigian v. Rick*, 489 F.Supp. 54 (D. Minn. 1980).

II. *BOTH THE ERISA AND THE SECTION 301 ALLEGATIONS SHOULD HAVE BEEN DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES*

The Fifth Circuit held that even though the unions failed to attempt to exhaust grievance and arbitration procedures, the lawsuit should not be dismissed as it is not clear whether or not these procedures were mandatory. 690 F.2d 489, 528.

We respectfully urge that this is an incorrect statement of the law. The Supreme Court has held that it is the *attempt* to exhaust grievance and arbitration procedures which is mandatory, not that the procedures themselves must be mandatory.

The doctrine of exhaustion of contractual grievance and arbitration procedures prior to bringing a §301 suit was first raised, by implication, in *Smith v. Evening News Assn.*, 371 U.S. 195 (1962) at footnote 1. This was later

clarified in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) where this Court held:

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.

379 U.S. at 652 (emphasis in the original).

In *Maddox*, the collective bargaining agreement in question was similar to that in the case at bar, in that it contained potentially conflicting language regarding whether or not a grievance "must" or "may" be brought. The Supreme Court analyzed this problem as follows:

> The language stating that an employee 'may discuss' a complaint with his foreman is susceptible to various interpretations; the most likely is that an employee may, if he chooses, speak to his foreman himself without bringing in his grievance committeeman and formally embarking on Step 1. Use of the permissive 'may' does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. *Any doubts must be resolved against such an interpretation.*

379 U.S. at 658-659 (emphasis supplied).

Maddox thus stands for the proposition that a prerequisite to a §301 suit is an attempt to exhaust any existing

grievance or arbitration procedure, whether mandatory or permissive. The petitioners are unaware of any circuit court which has, until now, held otherwise.

This argument applies with equal force to proceedings under ERISA. The legislative history of ERISA is set out in the Joint Explanatory Statement of the Committee of Conference on ERISA, House Conference Report No. 93-1280 (U.S. Code Cong. and Adm. News, 93rd Congress, Second Sess. (1974) P. 5038 *et seq.*) This history shows that all actions under ERISA to enforce benefit rights under a covered plan or to recover benefits under the plan whether brought in federal or state courts "are to be regarded as arising under the laws of the United States in similar fashion to those brought under §301 of the Labor-Management Relations Act of 1947." U.S. Code Cong. and Adm. News, *supra* at 5107.

Sound policy requires that the exhaustion doctrine, which is a prerequisite to a §301 suit, be applied with equal force to a suit arising under ERISA and many courts have so held. See *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Lucas v. Warner & Swasey Co.*, 475 F.Supp. 1071 (E.D. Pa. 1979); *Morgan v. Laborer's Pension Trust Fund for Northern California*, 443 F.Supp. 518 (N.D. Calif. 1977); *Fox v. Merrill Lynch & Co.*, 453 F.Supp. 561 (S.D. N.Y. 1978); *Hammil v. Hoover Ball & Bearing Co.*, __ F.Supp. __, 85 LRRM 2231 (E.D. Pa. 1973).

III. *THIS CONTROVERSY IS A LABOR DISPUTE AND THEREFORE EXEMPT FROM THE FEDERAL ANTITRUST LAWS.*

Apex Hoisery Co. v. Leader, 310 U.S. 469 (1940), involved a suit by an employer against members of a union

for conducting a violent sit-down strike and thereby forcing its business to close. The company contended that this action restrained interstate commerce. Because the employer's goods were effectively prevented from entering interstate commerce, the labor activities involved undoubtedly would have constituted an antitrust violation under prior case law. The Supreme Court held, however, that this was not the kind of restraint at which the Sherman Act was aimed. Rather, said the Court:

> The end sought was the prevention of restraints to free competition *in business and commercial transactions* which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. [Footnote omitted, emphasis supplied]

310 U.S. at 493.

Since this is what "restraint of trade" actually means, the conduct of the union was not covered by the Act and the suit was dismissed. It did not matter that the union's conduct may have been illegal or violent—it still was exempt from antitrust prosecution since there was no restraint on *commercial competition.*

This rationale was applied by the Fifth Circuit in *Prepmore Apparel v. Amalgamated Clothing Workers,* 431 F.2d 1004 (5th Cir. 1970), where a labor union claimed the defendant employer had conspired with a competitor (Blue Bell) to destroy the union's local operation by refusing to deal with it concerning wages and conditions of employment. *Prepmore* thus dealt with the same issue as *Pratt-Farnsworth, i.e.,* whether employers may engage in con-

certed activities to avoid labor unions. The Fifth Circuit dismissed the Sherman Act claim in *Prepmore*, holding that the alleged conduct by defendants did not constitute a restraint on commercial competition in the marketing of goods and services.

The Second Circuit reached a similar conclusion in *Kennedy v. Long Island Railroad Co.*, 319 F.2d 366 (2d Cir. 1963), in which antitrust allegations were brought against several railroads for entering into a "strike insurance plan." The court held these assertions failed to state a claim "for the fundamental reason that the named statutes were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor management relations." 319 F.2d at 372-373.

The Supreme Court recently reaffirmed this fundamental premise in *H.A. Artists & Assoc. v. Actors Equity Assn.*, 451 U.S. 704, (1981). In that case, this Court scrutinized a system whereby a union representing most stage actors and actresses established a licensing requirement for the regulation of theatrical agents. Union members were forbidden to deal with agents who refused to accept the regulations or apply for franchises from the union. A group of agents who refused to accept the regulations or apply for franchises brought suit in the Southern District of New York contending that the union's regulation of theatrical agents violated the Sherman Act. The Supreme Court affirmed the decisions of the district court and the Second Circuit which held that this agreement was exempt from Sherman Act scrutiny in that it was a labor dispute, and further that the matter in issue did not involve "commercial competition." As the Court noted:

> [In *Apex Hoisery*] the court reasoned that the Sherman Act prohibits only restraints on 'commercial competition,'...or those market restraints designed to monopolize supply, control prices, or allocate product distribution—and that unions are not liable where they merely further their own goals in the labor market.

451 U.S. at 715, note 16.

Thus, just as unions are not liable where they merely further their own goals in the labor market, so employers are not liable when they further their own goals in the labor market—as opposed to their goals in the commercial market which goals are, of course, the purpose of Sherman Act scrutiny. *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485 (1949).

The Fifth Circuit accepted this basic rationale, but misapplied it. The court properly analyzed the major concern of the unions as being "the effect the defendants' alleged conspiracy will have on the ability of the union to represent their member employee," and held that to the extent the pleadings alleged merely a concerted refusal to deal with the union in an attempt to restrain competition in wages and working conditions, they did not state a cause of action under the antitrust law. (690 F.2d at 534)

The court went on, however, to analyze the pleadings as somehow alleging a concerted refusal to deal not with the unions themselves, but with other contractors who hire union workers, or to allege a concerted refusal to deal with contractors who did not create "double-breasted" union-nonunion arrangements. The court then concluded that these were allegations which involved an anti-competitive

restraint in the area of competition for services of contractors, though it expressed doubt whether the unions had standing to bring such an action.

It is respectfully submitted that this misapprehends the nature of the lawsuit and ignores established law which determines what is a "labor dispute," as will be shown below.

United States v. Hutcheson, 312 U.S. 219 (1941), involved a case in which criminal charges had been brought under the Sherman Act against the Carpenters Union for engaging in a strike over a jurisdictional dispute with the Machinists Union. In its analysis of this issue, the Supreme Court held that whether or not this contract violated the Sherman Act "is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." 312 U.S. at 231. Thus, the case stands for the general proposition that all three of these laws must be read together in order to determine the proper accommodation of federal labor goals and federal antitrust goals. It is clear then that a "labor dispute" within the meaning of the Norris-LaGuardia Act is a "labor dispute" within the meaning of §20 of the Clayton Act and thereby exempt from antitrust considerations under the Sherman Act.

Section 13 of the Norris-LaGuardia Act supplies definitions which easily extend to cover the situation in the instant case, namely one which involved "persons who are engaged in the same industry" and which involves "terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or condi-

tions of employment," even though as regards some of the plaintiffs and some of the defendants, the disputants do not "stand in the proximate relation of employer and employee."

The term "labor dispute" has been broadly defined judicially, as well. See, for example, *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (picketing against racial discrimination in employment, although none of the protestors were employees); *Port of Houston Authority v. Int'l Org. of Masters, Mates & Pilots*, 456 F.2d 50 (5th Cir. 1972) (informational picketing against use of foreign ships); *Corporate Printing Co. v. New York Typographical Union No. 6*, 555 F.2d 18 (2d Cir. 1977) (union's organizing of managerial employees who were not covered under the National Labor Relations Act).

In *Hutcheson, supra*, as well as the other cases cited, the courts recognized that the statutory exemption provided by the Clayton and Norris-LaGuardia Acts applies only so long as there is not an agreement or concerted activity between the labor union and non-labor groups. Thus, while *disputes between* unions and non-labor groups, are exempt from antitrust scrutiny, agreements between unions and employers may be violative of the Sherman Act if they restrain trade. Of course, accommodation between federal policy regarding labor law and federal policy regarding monopolies requires that some union-employer agreements be accorded a limited non-statutory exemption from antitrust sanctions. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

As explained recently in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), a detailed examination of the union-employer agree-

ment must be made to determine whether such agreements impose a "direct restraint on the business market" that "would not *follow naturally* from the elimination of competition over wages and working conditions" and whether the restraint on the business market has a substantial anti-competitive effect which "contravenes antitrust policies to a degree not justified by congressional labor policy...." 421 U.S. at 625 [emphasis supplied].

The agreement scrutinized in *Connell*, required a general contractor to subcontract only with those companies already signatory to a collective bargaining agreement with the defendant union. Within the jurisdiction of the union, therefore, the general contractor was forbidden to subcontract to any nonunion company regardless of economic considerations. This was an unreasonable restraint on the market and did not "follow naturally" from the elimination of competition on wages. To that extent the agreement between *Connell* and the union was not exempt.

There is no such agreement in the instant case. Rather, the agreement in question is a typical collective bargaining agreement negotiated at arm's length between a council of unions and an employer association. It contains no illegal provisions such as those found in *Connell*.

It has been stated that "judges should not, under cover of the Sherman Act umbrella, substitute their economic and social policies for free collective bargaining." *Meat Cutters Union v. Jewel Tea Company, Id.*, at 726 (1965) (Goldberg, dissenting and concurring opinion). What was true then is equally true now.

Recognizing that the Sherman Act is not "a panacea

for all business affronts which seem to fit nowhere else," *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), the district court properly analyzed this case when it held:

> In the instant case, the plaintiff unions and class members are complaining of collective bargaining obstruction and consequent injury to union functions and representation. This controversy can only be characterized as a labor dispute initiated by construction industry employees against their employers and the employer associations. Accordingly, the antitrust laws do not provide a vehicle for challenging the practices under attack in this suit.

511 F.Supp. at 515-16.

CONCLUSION

The Fifth Circuit's opinion in the present case constitutes a serious departure from labor laws and antitrust policies. This case merits the review of this Court.

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CERTIFICATE

I, Frederick S. Kullman, hereby certify that I have on this 18th day of February, 1983, caused three copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served by United States Mail, postage prepaid, upon the following counsel of record for Respondent:

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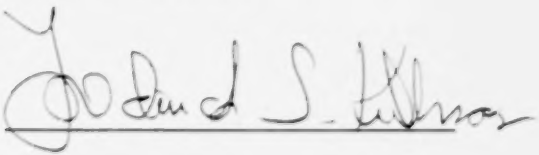

NO. 82-1414

In the Supreme Court of the United States

OCTOBER TERM, 1982

PRATT-FARNSWORTH, INC., HALMAR, INC., NEW ORLEANS DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LA., INC., AT-LARGE DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LA., INC.,

Petitioner,

v.

CARPENTERS LOCAL UNION NO. 1846 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT VOLUME II—APPENDIX "A"

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APPENDIX "A"

CARPENTERS LOCAL UNION NO. 1846 OF the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, et al., Plaintiffs-Appellants,

v.

PRATT-FARNSWORTH, INC.; Halmar, Inc.; Associated General Contractors of Louisiana, Inc., At-Large District; and Associated General Contractors of Louisiana, Inc., New Orleans District, Defendants-Appellees.

No. 81-3222.

United States Court of Appeals,
Fifth Circuit.

Nov. 4, 1982.

Unions and employee benefit funds brought action against contractors and contractors' associations alleging violations of Labor Management Relations Act, of Employee Retirement Income Security Act and of antitrust statutes. The United States District Court for the Eastern District of Louisiana, Jack M. Gordon, J., 511 F.Supp. 509, dismissed complaint and plaintiffs appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) absence of contractual relationship required dismissal of claimed violations by associations of collective bargaining agreement; (2) unions and funds should have been given opportunity to prove that one of contractors refused to pay contributions on behalf of its own employees; (3) breach of contract claim could be stated against contractors under either alter ego theory or under single employer theory,

and in latter case, District Court would have jurisdiction to address issue of appropriateness of bargaining unit; (4) ERISA cause of action was stated; (5) summary disposition of case was inappropriate; and (6) cause of action existed under antitrust laws.

Affirmed in part, reversed in part.

Jerry L. Gardner, Jr., Marie Healey, New Orleans, La., for plaintiffs-appellants.

Frederick A. Kullman, Michael S. Mitchell, Frederick S. Kullman, New Orleans, La., for defendants-appellees.

James Burton, H. Bruce Shreves, New Orleans, La., for Pratt-Farnsworth and Halmar, Inc.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, RANDALL and TATE, Circuit Judges.

RANDALL, Circuit Judge:

This appeal essentially involves an all-out assault by two unions and other related parties on the so-called "double breasted"[1] system of conducting business utilized by

[1] A "double breasted" or "open shop-closed shop" operation is one in which an employer is able to compete for both union and non-union work. For example, a subcontractor may operate one corporation hiring strictly union employees; this corporation will bid on jobs from general contractors who let contracts only to unionized subcontractors. At the same time, the subcontractor will operate another corporation that hires only non-union employees; this corporation will bid on work from general

contractor employers in the construction business in the New Orleans area. Hotly contested causes of action are alleged under several legal theories, primarily pursuant to the federal labor and antitrust laws; the district court dismissed all claims against the many defendants involved in this action. As explained more fully *infra*, we affirm the dismissal of certain claims, reverse the dismissal of others, and remand to the district court for further proceedings and development of a more complete factual record.

I. FACTUAL AND PROCEDURAL BACKGROUND.

This lawsuit was brought by Carpenters Local Union No. 1846 and Piledrivers Local Union No. 2436 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (hereinafter "Unions"), both unincorporated labor organizations engaged in representing construction employees within the jurisdiction of the United States District Court for the Eastern District of Louisiana. Also party plaintiffs in the suit are three employee benefit funds established on the basis of various collective bargaining agreements between the Unions and signatory employers in the construction industry: the Carpenters District Council of New Orleans and Vicinity Pension Trust, the Carpenters District Council of New Orleans and Vicinity Health and Welfare Plan, and the Carpenters District Council of New Orleans and Vicinity Apprenticeship, Educational and Training Program (hereinafter "Funds"). Additionally, the suit was brought as a class action on behalf of proposed classes of all members of and all persons

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(Footnote 1 continued)
contractors who use non-union workers. *Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Green, Inc.*, 653 F.2d 972, 976 n.7 (5th Cir. 1981), *cert. denied*, __ U.S. __, 102 S.Ct. 2235, 72 L.Ed.2d 846 (1982).

seeking employment through the Unions and all participants and beneficiaries of the named Funds. No class has at present been certified by the district court.

Four defendants were named: Pratt-Farnsworth, Inc. ("Farnsworth"); Halmar, Inc. ("Halmar"); Associated General Contractors of Louisiana, Inc., New Orleans District ("AGC-New Orleans"); and Associated General Contractors of Louisiana, Inc., At Large District ("AGC-At Large"). The Associated General Contractors, Inc. is a trade organization consisting of various construction companies throughout Louisiana. It is divided administratively into several geographic districts. AGC-New Orleans is one of those districts. AGC-At Large is not limited to any geographical area. Farnsworth is a construction company in the New Orleans area and a member of AGC-New Orleans. Halmar is also a construction company in New Orleans and a member of AGC-At Large.

One of AGC-New Orleans' activities is the negotiation, on behalf of certain of its members, of collective bargaining agreements with local trade unions. AGC-New Orleans is not itself a signatory to these bargaining agreements; rather, the agreements are signed only by the member and non-member contractors who wish to be bound. In the instant case, AGC-New Orleans negotiated a collective bargaining agreement between a multiemployer bargaining unit and the Unions covering the period from May 1, 1977 to April 30, 1980. This agreement constitutes the controverted subject matter of this suit.

Defendant Farnsworth affiliated itself with the AGC organizations, and authorized AGC-New Orleans to bargain on its behalf with the Unions over wages, terms, and conditions of employment. Farnsworth is a signatory

to the collective bargaining agreement negotiated by AGC-New Orleans and the Unions. AGC-New Orleans, AGC-At Large, and Halmar are not signatories to the collective bargaining agreement.

In their complaint, plaintiffs have alleged causes of action under three different sets of federal statutes, namely, (1) section 301(a) of the Labor Management Relations Act, 28 U.S.C. § 185(a) (hereinafter "LMRA"); (2) the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (hereinafter "ERISA"); and (3) the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1-7, 12-27.

Multiple allegations were made by the plaintiffs under each of these statutory causes of action. First, the plaintiffs alleged violations of the antitrust laws. The gravamen of their antitrust complaint is that the four defendants have conspired to restrain competition in the contractor services market in the New Orleans area by carving out an enclave of non-union carpentry work, access to which is denied union contractors in the industry. They contend that the effect of this alleged conspiracy is to nullify the multiemployer bargaining agreement between the Unions and the signatory contractors, and to coerce third parties in the construction industry to hire non-union contractors and subcontractors.

The plaintiffs' claims under section 301 of the LMRA echo their antitrust allegations. They allege that a "double breasted" operation exists between defendants Farnsworth and Halmar and is being used to channel construction work into Halmar, the non-union part of the operation, while operations of Farnsworth are being phased out slowly to the point of nonexistence. The plaintiffs argue that Farnsworth and Halmar should be treated as a

single employer or as alter egos with the result that Halmar would be bound by the collective bargaining agreement that Farnsworth executed with the Unions.

The ERISA cause of action is likewise interrelated with the section 301 labor action. The plaintiffs argue that Farnsworth and Halmar have breached the collective bargaining agreement by failing to submit fringe benefit contributions on behalf of their employees to the Funds as required by the agreement.

Defendants moved for dismissal for failure to state a claim and in the alternative for dismissal for lack of subject matter jurisdiction and for summary judgment. Affidavits were attached to these motions.[2] Plaintiffs thereafter filed a set of interrogatories addressed to the defendants.[3]

Before the defendants had filed any answers to the

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[2] Attached to these motions were two affidavits. The first affidavit was executed by Robert Farnsworth as President of Halmar stating that Halmar had never signed a collective bargaining agreement with the Unions.

The second affidavit by H. Pratt Farnsworth, Jr., Vice-President of Farnsworth, admitted that Farnsworth was a signatory to the collective bargaining agreement with the Unions. It stated, however, that none of the plaintiffs had ever attempted to file a grievance with Farnsworth pursuant to the contractual dispute mechanism contained in the agreement. Attached to this second affidavit were selected portions of the bargaining agreement in question.

[3] Plaintiffs also filed a statement in opposition to the defendants' pending motions. Attached to this statement were two affidavits. The first was a sworn statement from the organizer of one of the Unions, Michael A. Laborde, attesting to the relationshp between Farnsworth and Halmar. The second was a sworn statement from Simon Paulino, Jr., also an organizer for the same Union, similarly describing the Farnsworth-Halmar relationship and explaining the role of the two AGC defendants in the Louisiana construction industry.

plaintiffs' interrogatories, the district court granted the defendants' motions to dismiss. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 511 F.Supp. 509 (E.D.La.1981). The district court held that AGC-New Orleans and AGC-At Large were not proper defendants to the section 301 labor claims and the ERISA claims because they had never signed the collective bargaining agreement with the Unions. *Id.* at 511-12, 514-15. The court dismissed the section 301 and ERISA claims against Farnsworth on the ground that the plaintiffs had never alleged any breach of the collective bargaining agreement on the part of Farnsworth in regard to its own employees. *Id.* at 512-15.

As to Halmar, the court dismissed the section 301 and ERISA claims on the basis that it had no authority to determine that Farnsworth and Halmar were a single employer or alter egos without also determining the appropriate bargaining unit of their employees, which, it held, would be an impermissible invasion of the jurisdiction of the National Labor Relations Board (hereinafter "NLRB" or "the Board"). *Id.* at 512-13. Additionally, the court held that dismissal of the section 301 and ERISA claims as to all defendants was required because of the plaintiffs' failure to exhaust the contractual grievance procedures provided in the collective bargaining agreement. *Id.* at 513-15.

Finally, the district court dismissed the antitrust allegations because it decided that the bargaining agreement fell within certain nonstatutory exemptions to the antitrust laws, and that the plaintiffs' causes of action were in reality labor law issues parading as antitrust claims. *Id.* at 512-22. The plaintiffs have appealed to this court, contesting the district court's dismissal on all claims as to all defendants.

Our task now is to determine whether the district court acted properly in dismissing the plaintiffs' claims. Except with respect to the question of exhaustion of contractual grievance procedures, we treat the district court's actions as dismissals under Rule 12(b)(6).[4] In our review of those claims dismissed under Rule 12(b)(6), we may not go outside the pleadings; we must accept all well pleaded facts as true and view them in the light most favorable to the plaintiffs. *Dike v. School Board*, 650 F.2d 783, 784 (5th Cir. 1981); *Brett v. First Federal Savings & Loan Association*, 461 F.2d 1155 (5th Cir. 1972). We cannot sustain the district court's dismissal for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). The district court did go beyond the pleadings in addressing the question of exhaustion of contractual grievance proceedings, and thus we will review its dismissal on that ground as a grant of summary judgment. Our review in that case involves the questions (1) whether there are any issues of material fact in dispute, and if not (2) whether the moving party is entitled to judgment as a matter of law. *Daly v. Sprague*, 675 F.2d 716 (5th Cir. 1982); *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1030-31 (5th Cir. 1982).

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[4] The district court granted dismissals of several claims on several different grounds. In some cases it was clear that the dismissals rested on the lack of a cause of action. In others, the district court dismissed claims because it believed that it lacked subject matter jurisdiction. Where the existence of a cause of action is inextricably bound up with the question of this court's subject matter jurisdiction, we treat the dismissal as one on the merits under Rule 12(b)(6) or as a grant of summary judgment under Rule 56. *Williamson v. Tucker*, 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981).

II. THE SECTION 301 ALLEGATIONS.

A. Section 301 Claims Against AGC-New Orleans and AGC-At Large.

Pursuant to section 301(a) of the LMRA, 29 U.S.C. § 185(a), federal courts have jurisdiction to examine alleged violations of collective bargaining agreements:

> Suite for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). A section 301 claim must satisfy three requirements: (1) a claim of violation of (2) a contract (3) between an employer and a labor organization. *E.G., Alvares v. Erickson*, 514 F.2d 156, 161 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975).

The plaintiffs concede that the two AGC defendants did not sign the collective bargaining agreement at issue in this case and therefore are not *contractually* bound by it. Nonetheless, the plaintiffs argue that a section 301 claim properly lies against the two AGC defendants because Farnsworth and Halmar breached the bargaining agreement, and the two AGC defendants conspired to effect that breach and actively encouraged it. The district court held that "[t]he absence of [a] contractual relationship between *AGC, New Orleans* or *AGC, At Large* and Carpenters District Council mandates dismissal as to them of the Sec-

tion 301 claim under settled authority in this jurisdiction." 511 F.Supp. at 512 (emphasis in original).

The plaintiffs contend that the absence of a contractual relationship between the two AGC defendants and themselves should not be regarded as fatal to the section 301 claims; rather, the plaintiffs argue that section 301 jurisdiction exists to assert a cause of action against a defendant whenever the object of the suit is the enforcement of rights guaranteed by a collective bargaining agreement in effect between an employer and a labor organization. In support of this contention, the plaintiffs cite three cases: *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); *Rehmar v. Smith*, 555 F.2d 1362 (9th Cir. 1977); *Alvares v. Erickson, supra*. These three cases are imapposite. In all of these cases, the issue was whether section 301 causes of action encompassed suits by individual union employees for the enforcement of rights guaranteed by a collective bargaining agreement entered into by their unions.

We note, however, that support for the plaintiffs' contention may be found in a recent decision by the Third Circuit. In *Wilkes-Barre Publishing Co. v. Newspaper Guild Local 120*, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, __ U.S. __, 102 S.Ct. 1003, 71 L.Ed.2d 295 (1982), the court stated that "so long as the obligation sought to be enforced has its source in the provisions of a collective bargaining agreement, remedies for its enforcement may be available under section 301(a) in suits other than on the contract itself." *Id.* at 380. Thus, the court determined that a federal court has jurisdiction over a section 301 suit brought against a non-party to a collective bargaining agreement who allegedly induces a party to breach the agreement. *Id.* at 376-81.

In making this determination, the court stated that "what emerges as the law of [this] circuit as to the meaning of section 301(a) is that it reaches not only suits *on* labor contracts, but suits seeking remedies *for violation* of such contracts." *Id.* at 380 (emphasis in original). The court reasoned that protection against tortious interference with a collective bargaining agreement involves protection of a property interest which has its source in the federal common law of labor contracts. *Id.* at 381. In addition, the court reasoned that the issue in such cases is not the nature of the remedy sought for an alleged violation of a collective bargaining agreement, but whether the remedy requires that the court from which it is sought interpret the agreement. *Id.* at 380.

Notwithstanding the Third Circuit's decision in *Wilkes-Barre*, courts have almost unanimously held that a section 301 suit may be brought for violation of a labor contract only against those who are parties to the contract at issue. *Aacon Contracting Co. v. Association of Catholic Trade Unionists*, 276 F.2d 958 (2d Cir. 1960), *aff'g and adopting* 178 F.Supp. 129, 130 (E.D.N.Y. 1959); *Haspel v. Bonnaz, Singer & Hand Embroiderers Local 66*, 216 F.2d 192 (2d Cir. 1954), *aff'g and adopting* 112 F.Supp. 944, 945 (S.D.N.Y.1953); *Fabian v. Freight Drivers Local 557*, 448 F.Supp. 835, 838 (D.Md. 1978); *Cate v. Blue Cross & Blue Shield*, 434 F.Supp. 1187, 1189 (E.D.Tenn.1977); *Beausoleil v. United Furniture Workers, Local 136-B*, 244 F.Supp. 719, 720 (D.N.H. 1965).

Indeed, this latter view has also been followed by a district court in our own circuit in a decision cited as controlling by the district court in the instant case. In *Dixie Machine Welding & Metal Works, Inc. v. Marine Engineers Beneficial Association*, 243 F.Supp. 489 (E.D.La.-

1965), a plaintiff employer brought suit in state court to enjoin the defendant union's picketing. The union obtained removal to federal district court on the ground that the proceeding was a section 301 action; it had argued that because the suit was based in part on the alleged breach of a collective bargaining agreement between the plaintiff employer and various labor organizations, it arose under section 301. Writing the opinion in *Dixie Machine Welding*, our late colleague and then-district court judge, Robert A. Ainsworth, Jr., held that the plaintiff's case was improvidently removed to federal court and that the district court had no jurisdiction to hear the case.

Judge Ainsworth noted that although a collective bargaining agreement existed between the plaintiff employer and its employees, no such agreement existed between the plaintiff employer and the Marine Engineers Beneficial Association, the defendant in the case. As a result, he concluded that this was not a suit for violation of a contract between an employer and a labor organization as required by section 301:

> While it is alleged by plaintiff that the activity of its employees (resulting from their refusal to cross the picket line of defendant) is being carried on in violation of the collective bargaining agreements between plaintiff and its employees, this suit is not against plaintiff's employees but against Marine Engineers Beneficial Association with which plaintiff has no agreement of any kind. Between the *parties* to this action, therefore, there is no collective bargaining agreement and this is not a "suit for violation of contracts between an employer and a labor organization" or between labor organizations which under Section 301 of the Labor Management Relations

Act would confer jurisdiction in this court.

243 F.Supp. at 491 (emphasis in original).[5]

The Unions attempt to circumvent the logic of the *Dixie Machine Welding* case, *supra*, by arguing that while no agreement exists between the two AGC defendants and themselves on which to base jurisdiction, the AGC defendants have nevertheless *conspired* to breach the agreement in effect between Farnsworth and the Unions. We must reject this argument. A conspiracy to violate a collective bargaining agreement does not, without more, state

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[5] According to our research, apparently only one Fifth Circuit decision has addressed (and it did so in a different context than we face here) the question whether a section 301 claim may be asserted against a nonsignatory party to a collective bargaining agreement. *International Union of Operating Engineers, Local 653 v. Bay City Erection Co.*, 300 F.2d 270 (5th Cir. 1962). In *Bay City*, an employer brought a section 301 suit against a local union for the breach of a no-strike clause in a collective bargaining agreement. The agreement had been executed between the employer and a trade council in behalf of its constituent local unions. The employer recovered $50,000 in damages in a jury trial before the district court, after proving that the union had blacklisted him in a manner making it difficult for him to obtain needed labor and materials. *Id.* at 270-71.

On appeal, one of the arguments raised by the defendant union was that because only the trade council had signed the bargaining agreement with the employer, the local union itself could not be held liable for breach of contract. The court held that the union, although not an actual signatory to the agreement, could nevertheless be held liable for its breach. *Id.* at 271-72. The court based its decision in large part on the fact that the trade council had explicitly signed the agreement as the authorized representative of its constituent locals, a circumstance not present here. *Id.* In this case, Farnsworth did not sign the collective bargaining agreement as the agent of either AGC-New Orleans or AGC-At Large intending that *they* be bound by the contract. The agreement specifically provided that only the signatory constituent *members of the AGC organizations* were bound. Thus, it was the AGC organizations who in essence acted as the representative of Farnsworth in negotiating the agreement. As a result, the situation in *Bay City* has no application to the particular facts here.

a cause of action under section 301 sufficient to confer jurisdiction on a federal court. *Kaylor v. Crown Zellerbach, Inc.*, 643 F.2d 1362, 1368 (9th Cir. 1981); *Russom v. Sears, Roebuck & Co.*, 558 F.2d 439, 441 n.3 (8th Cir.), *cert. denied*, 434 U.S. 955, 98 S.Ct. 481, 54 L.Ed.2d 313 (1977); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1253-54 (2d Cir. 1970), *cert. denied sub nom. United Steelworkers v. Abrams*, 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971); *Aacon Contracting Co. v. Association of Catholic Trade Unionists, supra; Berard v. General Motors Corp.*, 493 F.Supp. 1035, 1042 (D.Mass.), *aff'd mem.*, 657 F.2d 261 (1st Cir. 1980), *cert. denied*, 451 U.S. 987, 101 S.Ct. 2322, 68 L.Ed.2d 845 (1981).

In conclusion, we must agree with the district court that the absence of a contractual relationship between AGC-New Orleans or AGC-At Large and the Unions requires dismissal of the section 301 claim against the two AGC defendants.

B. Section 301 Claims Against Farnsworth.

As stated before, a section 301 claim must satisfy three requirements before it may be asserted in federal court: (1) a claim of violation of (2) a contract (3) between an employer and a labor organization. 29 U.S.C. § 185(a). All three of these requirements appear to be met with respect to defendant Farnsworth. Both the plaintiffs and the defendants in this action concede that Farnsworth signed the collective bargaining agreement with the Unions and that Farnsworth is an employer of the Unions' membership; moreover, the original complaint filed by the plaintiffs alleged that Farnsworth had violated the collective bargaining agreement.

The district court apparently never considered the plaintiffs' section 301 claims against Farnsworth separately and apart from their section 301 claims against Halmar, presumably because of the allegation that Farnsworth and Halmar were alter egos who were both liable for violation of the collective bargaining agreement. However, the pleadings offered by both the Unions and the Funds allege simply that "defendants" have obligated themselves to make employee contributions, and this implies that not only Farnsworth *qua* Halmar but Farnsworth *qua* Farnsworth may be in breach of its obligations. Having stated such a claim for relief, we think that the plaintiff Unions and Funds should have at least been given an opportunity to prove that Farnsworth refused to pay contributions on behalf of those employees who no one contests are Farnsworth's own. Thus we cannot sustain a 12(b)(6) dismissal with respect to Farnsworth and must remand for consideration on the merits of this breach of contract claim.

C. Section 301 Claims Against Halmar.

The Unions' and Funds' section 301 claims against Halmar present a much more difficult problem. The plaintiffs are suing Halmar for its alleged violation of the collective bargaining agreement executed between the Unions and Farnsworth Unlike Farnsworth, however, Halmar never signed the collective bargaining agreement; therefore, unless the plaintiffs can establish an alternative ground for holding Halmar to the agreement, Halmar must be treated the same as the nonsignatory AGC defendants, and we must affirm the district court's dismissal of the section 301 claims against Halmar.[6]

[6] Consultation of the legislative history of § 301 affords virtually no guidance here. The Congress appears to have been primarily motivated by two concerns: that the difficulty of suing unincorporated

The relevant portions of the plaintiffs' com-

(Footnote 6 continued)
associations under then-current law enabled unions to escape responsibility for their breaches of collective bargaining agreements; and that any money judgment that was obtained against a union might be enforced as a personal liability of each member. *See generally* H.Rep.No. 245, 80th Cong., 1st Sess. 6, 45-46, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 297, 336-37 (1948); H.Min.Rep.No. 245, 80th Cong., 1st Sess. 108-10, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 399-401 (1948); S.Rep.No. 105, 80th Cong., 1st Sess. 15-18, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 421-24 (1948); S.Min.Rep.No. 105, 80th Cong., 1st Sess. 13-15, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 475-77 (1948); H.Conf.Rep.No. 510, 80th Cong., 1st Sess., reprinted in 1947 U.S.Code Cong. & Ad.News, 1135, 1172-73; 93 Cong.Rec. H6438 (daily ed. June 3, 1947) (statement of Rep. Case), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 873 (1948); 93 Cong.Rec. S3955 (daily ed. April 23, 1947) (statement of Sen. Taft), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1014 (1948); 93 Cong. Rec. S4265 (daily ed. April 28, 1947) (statement of Sen. Taft), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1074 (1948); 93 Cong.Rec. S4410-11 (daily ed. April 30, 1947) (remarks of Sen. Smith), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1145-46 (1948); 93 Cong.Rec. S5146-47 (daily ed. May 12, 1947) (statement of Sen. Ball), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1497 (1948); 93 Cong.Rec. SA2377 (daily ed. May 13, 1947) (statement of Sen Ball), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1524 (1948); 93 Cong.Rec. SA3232 (daily ed. June 21, 1947) (statement of Sen. Taft), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1626 (1948); 93 Cong.Rec. S7690 (daily ed. June 23, 1947) (statement of Sen. Taft), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 1654 (1948).

Nothing in the legislative history of § 301 bears on the question of holding a nonsignatory to a collective bargaining agreement. Only two comments in the history seem at all relevant to this case. The Senate Report (on the Senate Committee version of the bill) stated that "breaches of collective agreement [*sic*] have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur ... [;] the aggrieved party should also have a right of action in the Federal courts."

plaint allege first, that Farnsworth and Halmar "are and at all times material herein have been affiliated business enterprises, with common ownership and management, centralized control of labor relations, sharing of equipment and other assets, and employees and they constitute a single integrated business enterprise, doing business within the geographic jurisdiction of the Court, and constituting a single employer for all purposes relevant thereto;" and second, that "[d]uring the terms of the collective bargaining agreement between the AGC and Carpenters District Council, described as the 'Craft Agreement', defendant employer Pratt-Farnsworth conspired with the knowledge and assent of the AGC and unknown labor persuaders (29 U.S.C. § 433(b)) to establish and operate Halmar in order to circumvent and evade the Craft Agreement provisions and create a union-free environment." 1 Rec. 3, 5. As will be developed later, the first of these two theories, when applied by the Board in the context of an unfair practice charge under the National Labor Relations Act, 29 U.S.C. §§ 151-168 (hereinafter "NLRB"), is known as the single employer doctrine, and the second, when so applied by the Board, is known as the alter ego doctrine. The plaintiffs, therefore, urge this court to hold that they have stated a claim, under section 301 of the LMRA, for

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(Footnote 6 continued)
S.Rep.No. 105, 80th Cong., 1st Sess. 15, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 421 (1948). The House Conference Report (on the bill as it became law) asserted that "[o]nce parties have made a collective bargaining contract [,] the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.Conf.Rep.No. 510, 80th Cong., 1st Sess. 42, U.S.Code Cong.Serv. 1947, 1135, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 546 (1948). Both of these comments seem to support the exercise of federal jurisdiction in doubtful cases, and hence support a liberal reading of the plaintiffs' claims in the context of a 12(b)(6) motion.

breach of the terms of a collective bargaining agreement by Halmar, a non-signatory to that agreement, on the basis of the single employer theory or the alter ego theory developed by the Board in unfair labor practice cases under the NLRA. Before progressing any further with the arguments advanced by the plaintiffs in support of their position that they have stated a claim under section 301, or the arguments advanced by the defendants against that position, it would be helpful to describe the origins and content of these two theories.

1. Single Employer Doctrine.

The single employer doctrine is a creation of the Board which allows it to treat two or more related enterprises as one employer within the meaning of section 2(2) of the NLRA, 28 U.S.C. § 152(2). Often the doctrine is invoked to combine the amount of business of two or more employers so that the whole will exceed the Board's self-imposed jurisdictional minimum. *E.G., Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc. (Radio Union)*, 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 78 (1965) (per curiam), *quoted with approval in South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800, 802 n.3, 96 S.Ct. 1842, 1843 n.3, 48 L.Ed.2d 382 (1976). The doctrine is not however, limited to use only as a jurisdictional tool. The finding that two entities are a single employer may have the consequence of treating them as one for purposes of considering the existence of an unfair labor practice in a proceeding before the Board. *E.g., Hageman Underground Construction*, 253 N.L.R.B. 60 (1980) (certain respondents constituted a single employer for purposes of NLRA; backhoe operators employed by such respondents constituted a single ap-

propriate unit; such respondents violated sections 8(a)(5) and (1) of the NLRA, 29 U.S.C. §§ 158(a)(5), (1), by refusing to recognize and bargain with the union as the exclusive representative of the employees in such unit and by failing to abide by the terms of the collective bargaining agreement covering such employees). The factors which the Board uses to determine the existence of single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Radio Union, supra*, 380 U.S. at 256, 85 S.Ct. at 877; *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979); *Sakrete, Inc. v. NLRB*, 332 F.2d 902, 905 (9th Cir. 1964), *cert. denied*, 379 U.S. 961, 85 S.Ct. 649, 13 L.Ed.2d 556 (1965). As the court noted in *Don Burgess, supra:*

> The Board has stressed the first three of these factors, as well as the presence of control of labor relations. [*Sakrete, Inc., supra*] at 905 n.4 (quoting with approval from *NLRB Twenty-First Annual Report* at 14-15). However, no one of the factors is controlling, *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Local 627, International Union of Operating Engineers v. NLRB*, 171 U.S.App.D.C. 102, 107-108, 518 F.2d 1040, 1045-46 (1975), *aff'd on this issue sub nom. South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976).

596 F.2d at 384.

A finding of single employer status does not by itself mean that all the subentities comprising the single employer will be held bound by a contract signed only by one. Instead, having found that two employers constitute a single employer for purposes of the NLRA, the Board then goes on to make a further determination whether the employees of both constitute an appropriate bargaining unit. As the Ninth Circuit stated in *Don Burgess*, 596 F.2d at 386, even if two firms are a single employer, a union contract signed by one would not bind both unless the employees of both constituted a single bargaining unit. The Ninth Circuit then explained the difference between an inquiry into single employer status and an inquiry into the appropriateness of the bargaining unit:

> In determining the appropriateness of a bargaining unit the focus differs from that employed in deciding whether there is a single employer. "In determining whether a single employer exists we are concerned with the common ownership, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved." *Peter Kiewit Sons' Co.*, 231 N.L.R.B. 76, 77 (1977).

596 F.2d at 386. *See Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 n.8 (1st Cir. 1981). Under the single employer doctrine, the focus is the interrelatedness of the *employers*, while in assessing an appropriate bargaining unit, the focus is on the similarity of concerns between *employees*. *See NLRB v. J. C. Penney CO.*, 559 F.2d 373, 375 (5th Cir. 1977) ("To [create a viable bargaining unit], the Board looks to such factors as bargaining history, operational integration, geographic proximity, common

supervision, similarity in job function, and degree of employee interchange."); *NLRB v. Belcher Towing Co.*, 284 F.2d 118, 121 (5th Cir. 1960) (the test which the Board applies in determining whether a bargaining unit is appropriate is "community of interests").

To view it another way, we have stated in *Local Union No. 59, International Brotherhood of Electrical Workers v. Namco Electric, Inc.*, 653 F.2d 143, 147 (5th Cir. 1981), that "[w]hether two firms are a single employer for collective bargaining purposes and whether a single contract is binding on two separate corporations are not only different questions, but they may have different answers." 653 F.2d at 147. Whether they have different answers is a function of the appropriateness of the bargaining unit comprising the employees of both firms.

The Board has often applied or sought to apply the single employer-appropriate bargaining unit inquiries to double breasted contractors. Indeed, the case that receives the most attention in the briefs of the plaintiffs and defendants in this litigation—*Peter Kiewit*—is a case which began when a union filed a complaint with the Board alleging that two double breasted contractors had violated sections 8(a)(5) and (1) of the NLRA, 29 U.S.C. §§ 158(a)(5), (1) by their continuing refusal to apply to the employees of the non-union contractor the collective bargaining agreement in effect with the union contractor. We explore the case in some detail not only because it is an example of how the single employer doctrine functions in an unfair labor practice context, but also because, as we shall see later, a determination as to what the case holds—or does not hold—is important to a resolution of the problems before us. The union's allegations in *Peter Kiewit* were that (1) the union contractor and the non-union contractor were in reality a

"single employer" and should be treated as such for the purpose of enforcing a collective bargaining agreement signed by the union contractor, and (2) because the two contractors were a single employer, the non-union contractor was obligated to recognize the union as the representative of a bargaining unit drawn to include both the non-union and the union contractors' employees. 425 U.S. at 801, 96 S.Ct. at 1842.

The NLRB found that the two contractors were separate employers and dismissed the complaint. *Peter Kiewit Sons' Co.*, 206 N.L.R.B. 562 (1973). On review, the District of Columbia Circuit held that the two contractors were in fact a single employer, finding "evidence [of] a substantial qualitative degree of interrelation of operations and common management" between the two companies. *Local 627, International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1047 (D.C.Cir.1975). The circuit court then went on to decide the second issue presented by the union's complaint, although the NLRB had not passed upon the bargaining unit question. The court held that the employees of the two contractors together constituted an appropriate unit for purposes of collective bargaining. *Id.* at 1047-50. On the basis of this conclusion, the court determined that the two contractors had committed an unfair labor practice by refusing to recognize the union as the bargaining representative of the non-union contractor's employees or to extend to them the terms of the collective bargaining agreement. *Id.* at 1050.

On appeal, the Supreme Court affirmed the court of appeals' determination on the single employer issue but vacated its holding that the employees of the two companies constituted an appropriate bargaining unit. 425 U.S. at 806, 96 S.Ct. at 1845. The Supreme Court held that

the circuit court had invaded the statutory province of the NLRB by proceeding to decide the unit question before the NLRB had passed upon the issue:

> Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, "if not final, is rarely to be disturbed," we think the function of the Court of Appeals ended when the Board's error on the "employer" issue was "laid baare".

Id. at 805-06, 96 S.Ct. at 1844-1845 (citations omitted). The Court then remanded the case to the NLRB for a determination of the bargaining unit issue. On remand, the NLRB decided that even though the two companies involved were a single employer, their employees together did not constitute an appropriate bargaining unit. *Peter Kiewit Sons' Co.*, 231 N.L.R.B. 76 (1977).

The Board made clear in *Peter Kiewit* that the existence of union and non-union construction firms historically operated side by side by a single employer is not, without more, a violation of a collective bargaining agreement with the signatory construction firm. As the Board stated in its original *Peter Kiewit* decision, 206 N.L.R.B. 562 (1973):

> It is not uncommon in the construction industry for the same interests to have two separate organizations, one to handle contracts performed under union conditions and the other under nonunion conditions. The Board has recognized this fact by refusing to include the employees of a nonunion company in the same bargaining unit with those of a union company controlled by the same interests, and by refusing to require the nonunion company to recognize the

> bargaining representative of the union company's employees or to apply the collective-bargaining contract with the latter to its own employees.

(footnotes omitted). The Board gave as examples of this policy its decisions in *Frank N. Smith Associates, Inc.*, 194 N.L.R.B. 212 (1971); *Gerace Construction, Inc.*, 193 N.L.R.B. 645 (1971); and *Central New Mexico Chapter, National Electrical Contractors Association, Inc.*, 152 N.L.R.B. 1604 (1965). *See also A-1 Fire Protection Inc.*, 233 N.L.R.B. 38 (1977), *enforced in part remanded sub nom. Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 600 F.2d 918 (D.C.Cir.1979), *on remand*, 250 N.L.R.B. 217 (1980), *remanded*, 676 F.2d 826 (D.C.Cir.1982). The Supreme Court, remanding the case to the Board in its *Peter Kiewit* decision, did not purport to challenge this policy, noting only that a finding of single employer status does indeed require the additional determination that both the signatory's and nonsignatory's employees belong to the same bargaining unit before both entities will be bound by one agreement. *See* 425 U.S. at 805, 916 S.Ct. at 1844.

It is clear that the primary motivation of the Board in making an independent unit determination in a single employer case is to protect the rights under section 7 of the NLRA, 29 U.S.C. § 157, of the employees of each of the subentities constituting the single employer to bargain collectively with representatives of their own choosing. Section 9(b) of the NLRA, 29 U.S.C. § 159(b), directs the Boardd to "decide in each case whether, in order to assure to employees the fullest freedom in exercising rights guaranteed by [the NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...." As

the Supreme Court recognized in *Peter Kiewit, supra*, at 1843-1844, and as we have set forth above, the factors leading to a single employer finding will not necessarily provide the assurance required by section 9(b) that the section 7 rights of the employees of the subentities involved will be adequately protected. That assurance is provided in an unfair labor practice case by the inquiry as to the appropriateness of the unit. Further, as will be shown in part II.C.8 of this opinion, even the fact that the union employer and the union have stipulated in the agreement as to the appropriate unit will not preclude an inquiry by the Board into the appropriateness of the unit comprising the employees of both the union and nonunion employers.

2. Alter Ego Doctrine.

As indicated above, the plaintiffs' pleadings allege (in addition to interrelation of operations, common management, centralized control of labor relations and common ownership between Farnsworth and Halmar) that Halmar is being operated to circumvent and evade the obligations of Farnsworth under the collective bargaining agreement between Farnsworth and the Unions. This rationale, broadly read, echoes another Board-created doctrine, that of the alter ego employer. Alter ego issues commonly arise in successorship situations, when ownership of a signatory company changes hands. Although a bona fide successor is not in general bound by a prior collective bargaining agreement, an alter ego will be so bound. *NLRB v. Tricor Products, Inc.*, 636 F.2d 266, 269-70 (10th Cir. 1980). This is because an employer will not be permitted to evade its obligations under the NLRA by setting up what appears to be a new company, but is in reality a "disguised continuance" of the old one. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106, 62 S.Ct. 452, 455, 86 L.Ed. 718

(1942). *See also Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 259 n.5, 94 S.Ct. 2236, 2242 n.5, 41 L.Ed.2d 46 (1974) (when "a mere technical change [is made] in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws ... the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.").

In deciding whether a company is an alter ego, the Board will often look to factors which bear some similarity to those involved in a single employer question; in particular, whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. *Hageman Underground Construction*, 253 N.L.R.B. 60 (1980); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976).[7] However, the focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations. *E.g., Amalgamated Meat Cutters v. NRLB*, 663 F.2d 223, 277 (D.C.Cir.1980) (sale of supermarket was not sham or

[7] The Ninth Circuit has, in several cases, seemed to state that the factors listed in *Don Burgess Construction, supra*, apply with equal validity to single employer and alter ego cases. *J. M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029 (9th Cir. 1982); *NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d 924 (9th Cir.), *cert. denied*, 449 U.S. 919, 101 S.Ct. 318, 66 L.Ed.2d 147 (1980). However, we think that the Board's decisions have made it clear that the doctrines are conceptually distinct. *Hageman Underground Construction*, 253 N.L.R.B. 60, 60 n.2 (1980) (Board found that two entities constituted single employer and that their employees were members of the same bargaining unit and thus would not reach alter ego determination); *Naccarato Construction Co.*, 233 N.L.R.B. 1394, 1398 (1977) (more must be shown for alter ego finding than single employer finding, since former and not latter binds nonsignatory to a collective bargaining agreement).

"paper" transaction); *NLRB v. Tricor Products, Inc. supra*, at 270 (motivation by anti-union sentiment a relevant factor in alter ego analysis); *NLRB v. Herman Brothers Pet Supply, Inc.*, 325 F.2d 68, 70-71 (6th Cir. 1963) (sale of store immediately after representation election was "a fictitious transaction to avoid dealing with the union and to discharge those employees who supported the union"); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1, 5-7 (8th Cir. 1960) (Board was entitled to find that identity of structure and continuance of operations existed to support alter ego finding or could find successor to be an instrument of "evasion as to the labor-wrongs situation").[8] Further, an alter ego case frequently contains specific findings on the substantial continuity of the work force from the union to the non-union employer. *E.g., Hageman Underground Construction*, 253 N.L.R.B. 60, 68 (decision of Shapiro, A.L.J. 1980) ("All of the construction workers on the payroll of [signatory employer] were transferred to the payroll of [non-signatory employer], where they performed the same work which they had done while working for [signatory employer], using the same skills, and under the same

[8] The history of a "double breasted" operation in existence prior to and during the time a union enters into a collective bargaining agreement with one half of the operation may be relevant evidence as to whether the nonsignatory is a sham created merely for the purpose of evading contractual obligations or is a bona fide enterprise of which the union was aware at the time it first negotiated an agreement with the signatory. Of course, the prior existence of the nonsignatory is not necessarily dispositive, since it may always be argued that although the nonsignatory existed as a bona fide operation prior to the agreement, a disgruntled management later sought to use the company as a means to avoid its obligations by deliberately shifting all the signatory's work away to the nonsignatory and leaving the signatory as an empty shell. For a running colloquy on the related question whether a union who enters into a collective bargaining agreement knowing a "double breasted" operation is in existence is thereby prevented from complaining about the non-union branch, *see A-1 Fire Protection Inc.*, 233 N.L.R.B. 38 (1977), *remanded*, 600 F.2d 918 (D.C.Cir.1979), *on remand* 250 N.L.R.B. 217 (1980), *remanded*, 676 F.2d 826 (D.C.Cir.1982).

immediate supervision."); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144, 1150 (decision of Dyer, A.L.J. 1976) ("The number of employees was reduced by [signatory employer's] unfair labor practices prior to the time [non-signatory employer] commenced business, but [non-signatory employer] continued the operations and the same employees with no discernible break.").

We have seen that the Board, in applying the single employer doctrine, makes an independent, careful investigation into whether the employees of two firms held to constitute a single employer constitute an appropriate bargaining unit. Only where the employees do constitute an appropriate unit will the non-signatory firm be bound to the collective bargaining agreement entered into between the signatory firm and the union. However, when the Board makes a finding that a non-signatory employer is the alter ego of a signatory employer which has voluntarily agreed to recognize the union's representative status in a unit stipulated in the collective bargaining agreement, the Board generally will not reconsider the unit under the community of interests test, but will simply make a far more limited determination whether the stipulated unit is repugnant to any policy embodied in the NLRA. *See Hageman Underground Construction*, 253 N.L.R.B. 60, 70 (decision of Shapiro, A.L.J. 1980); *Pioneer Inn Associates*, 228 N.L.R.B. 1263, 1272 (decision of Shapiro, A.L.J. 1976) ("The salutary purpose of such agreement [as to the boundaries of an appropriate unit] would be frustrated if the parties were free to repudiate them at will and, thus, absent extraordinary circumstances or a clear denial of employees' rights, the Board will not permit such repudiation, even where it would not have found the unit appropriate if the matter had been brought before it initially."), *enforced*, 578 F.2d 835 (9th Cir. 1978). The

Board's reluctance to reexamine a stipulated unit in an alter ego case clearly stems from the fact that the conclusion tht one employer is the alter ego of another is based on a holding that the two are in reality the same employer.

3. The Distrit Court's Decision.

Having described the single employer and alter ego theories developed and applied by the Board, generally in the context of determining whether sections 8(a)(5) and (1) of the NLRA, 29 U.S.C. §§ 158(a)(5), (1), have been violated by the refusal of a nonsignatory employer to abide by the terms of a collective bargaining agreement between a related signatory employer and the union, we turn to the district court's decision in this case. The district court assumed that *Peter Kiewit* meant that a federal court was powerless to make an initial bargaining unit determination even in a section 301 suit, for it concluded that

> adoption of plaintiffs' assertion that *Farnsworth* and *Halmar* are a single employer so as to make the instant labor contract binding upon *Halmar* necessarily would require a determination of the appropriate bargaining unit, and that such determination would be an invasion of the exclusive province of the N.L.R.B. not distinguishable from that condemned by the Supreme Court in the *Peter Kiewit* case. Hence, the motions to dismiss the Section 301 claims brought by *Farnsworth* and *Halmar* must be granted.

511 F.Supp. at 513 (emphasis in original).[9] As a preliminary

[9] We note that another district court, on facts strikingly similar to this case, reached the same conclusion as the district court here. *Couchigian v. Rick*, 489 F.Supp. 54 (D.Minn.1980). While in *Couchigian* the union (which was not a plaintiff in the § 301 action; only the pension

matter, we note that behind the district court's reasoning lies the assumption that the pleadings allege only the single employer theory. But, as we have seen, the pleadings also allege the alter ego theory as a basis for the Unions' breach of contract action. Were we to accept the plaintiffs' argument that they have stated a claim under section 301 employing the alter ego theory, and were we to hold that the district court should apply that theory in the same manner as the Board applies it in the unfair labor practice context, then, as described in part II.C.2 above, a *de novo* determination of the appropriate bargaining unit might well not be necessary. Depending upon the proof, the district court might be able to limit itself to a consideration of whether the resulting unit is repugnant to the purposes of the NLRA, a far more limited inquiry. For the time being, we note only that the pleadings cannot be construed to allege only a single employer theory.

4. The Substantive Law to be Applied under Section 301.

The district court's determination is significant as much for its unstated premise as for its ultimate conclusion. That premise is that a district court, in an action for breach of contract under section 301 in which single employer status is alleged as a basis of recovery, would apply the single employer theory in the same fashion as it is employed by the Board in the unfair labor practice context.

(Footnote 9 continued)
funds were) had sought a single employer determination by the Board, which the Board refused on procedural grounds, the court's language indicates it did not consider that a critical factor. While a prior attempt to have the Board rule on the claim might affect our view of such a case (*see* part II.C.5, *infra*), we reject the reasoning of the *Couchigian* court in this case. *See* part II.C.5, *infra*.

Under this approach, if the district court were to find that Farnsworth and Halmar were a single employer, a favorable determination as to the appropriateness of the bargaining unit consisting of the employees of both companies would be necessary before Halmar would be bound by the collective bargaining agreement entered into between the Unions and Farnsworth. Upon examination, we think that the district court's premise was correct, and we would broaden it to include suits under section 301 based upon allegations of alter ego status as well.[10]

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[10] This analysis is by no means unprecedented. We were faced with a related problem recently in *Local Union No. 59, International Brotherhood of Electrical Workers v. Namco Electric, Inc.*, 653 F.2d 143 (5th Cir. 1981).

In *Namco*, a union sought to bind a non-signatory employer, Namco Electric, to a collective bargaining agreement entered into with Frauman Electric Co. The union's theory was that Namco was an alter ego corporation of Frauman or merely a "fictitious identity" assumed by Frauman. The district court granted summary judgment for the defendant corporations, holding that a representational issue would necessarily have to be decided and that *Peter Kiewit* prohibited such a determination. A panel of this circuit, in an opinion written by Judge Rubin, affirmed, but on a different ground. The panel held that the union had not come up with sufficient evidence to contest the factual evidence in the record that Namco and Frauman were not the same corporation but were in fact two distinct business entities. However, in the course of reaching this conclusion the court stated in dicta:

> Without at this time attempting to explore the full reach of the [*Peter Kiewit*] decision, we assume, without deciding, that it does not foreclose jurisdiction of a claim for contract breach based on proof that the defendant, while not expressly bound by a collective bargaining agreement, is the alter ego of a signatory to the agreement. Relying on this proposition, the union contends that the district court incorrectly held that it lacked jurisdiction.
>
> That Namco is but Frauman in another garb, is a possible interpretation of the allegations in the complaint. Because the Frauman employees had already been certified as an appropriate bargaining unit, such a circumstance would not present a question of the propriety of the bargaining unit.

As the Supreme Court held in *Textile Workers*

(Footnote 10 continued)

> The motion for summary judgment and supporting materials have demonstrated, however, that the contention in the complaint is not a permissible version of the facts. Our affirmance, therefore, is based, not on lack of jurisdiction to consider the complaint, but on its absence of merit.
>
> The union's reliance on *Bugher v. Frash*, 98 LRRM 3010 (S.D.Ind.1977), is misplaced, for in that case the question, raised on a motion to dismiss for failure to state a claim for which relief could be granted, was solely whether a corporation "could *conceivably* be found to be bound to the labor contracts entered into by its alleged *alter ego*." *Id.* at 3011 (emphasis supplied). The record before us establishes beyond genuine dispute that Namco and Frauman were separate entities and that Namco was not the alter ego of Frauman. Therefore, the hypothetical posed by the procedural posture in *Frash* is not here relevant.

653 F.2d at 145-46. That hypothetical problem, a claim raised in the context of a 12(b)(6) motion, is squarely before us today.

Bugher v. Frash, 98 L.R.R.M. 3010 (S.D.Ind.1978), as mentioned in *Namco*, did involve circumstances very similar to the ones we are presented with here. In *Frash, trustees of certain union pension plans brought suit in federal district court under* § 301 of the LMRA and § 502(a)(3)(B)(ii) of ERISA, 29 U.S.C. §§ 185, 1132(a)(3)(B)(ii), seeking to hold Frash, Inc. to the terms of a bargaining agreement executed between two unions covered by the plans and the defendant Frash Earth Works. The plaintiff trustees alleged that Frash, Inc. and Frash Earth Works were alter ego corporations and that Frash, Inc. should therefore be bound to the agreement. *Id.* at 3011.

The two defendant corporations moved to dismiss for lack of subject matter jurisdiction, contending that the district court could not decide the alter ego issue without also determining the appropriate bargaining unit and thereby usurping the NLRB's jurisdiction over the latter issue. The court rejected the defendants' argument.

> Although the Court is in agreement with defendant Frash, Inc.'s argument regarding the exclusivity of NLRB jurisdiction to determine appropriate bargaining units and its arguments concerning single-employer and/or multi-employer bargaining units, dismissal of plaintiffs' claim against said defendant is unwarranted. As the Court inter-

Union v. Lincoln Mills, 353 U.S. 448, 456, 77 S.Ct. 912, 917,

(Footnote 10 continued)

> prets plaintiffs' complaint in regard to defendant Frash, Inc., the plaintiffs seek to hold said defendant liable on a type of alter ego theory. The complaint contains no allegations that Frash, Inc. is directly bound to any collective bargaining agreement with the labor organizations represented, in effect, by plaintiffs, and the record of the case at its present juncture reflects that Frash, Inc. was not bound by any labor agreements. Going no further, as a matter of federal labor law dismissal of the claim would be called for, but plaintiffs inject a theory having its roots in corporate law under which defendant Frash, Inc. could conceivably be found to be bound to the labor contracts entered into by its alleged *alter ego* Robert Ellis Frash d/b/a Frash Earth Works.
>
> Depending upon the proof, the two defendants could be found to be one and the same entity, and the incorporation of Frash, Inc. could be found to be a sham or could be disregarded for certain particular purposes. In such circumstances, the labor agreements entered into by Frash Earth Works could be found to be binding on the corporate defendant.
>
> ...
>
> When thus viewed as a corporate liability case in substance, *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 92 LRRM 2507 (1976), and its statements about the deference which must be accorded by the courts to the NLRB's exclusive jurisdiction are insufficient to mandate dismissal. An avenue for relief, albeit a narrow one entirely dependent upon proof that Frash, Inc. and Frash Earth Works are one and the same, exists under which plaintiffs could recover. Thus, although defendant Frash, Inc.'s arguments are, in the most part, convincing and although they narrowly circumscribe the path which plaintiffs must follow to recover plaintiffs' complaint against said defendant states a claim upon which relief can be granted.

Id. at 3011-12. The opinion in *Frash* views the requisite showing of identity as grounded in more or less standard doctrines of corporate law. However, because we deal with the special area of labor agreements, we think an alter ego theory must be specifically attuned to the policies and concerns of the federal labor laws if it is to form the basis of a cause of action under section 301.

1 L.Ed.2d 972 (1957), the substantive law to be applied in suits under section 301 is federal law, "which the courts must fashion from the policy of our national labor laws." It was Congress' stated goal in adopting section 301 to treat collective bargaining agreements as contracts fully enforceable in federal courts, in order to encourage the making of such agreements and to promote industrial peace through faithful performance of such agreements. *Id.* at 453-54, 77 S.Ct. at 916. The NLRA similarly has as one of its goals the promotion of industrial peace through faithful performance of collective bargaining agreements. 29 U.S.C. § 151. We have seen that the Board has developed the single employer and alter ego theories in the context of unfair labor practice proceedings in which it is alleged that related employers have violated sections 8(a)(5) and (1) of the NLRA by failing to abide by the terms of a collective bargaining agreement entered into by one of them. Both of those theories are clearly designed to promote the faithful performance of a collective bargaining agreement not only by the signatory employer but also by a non-signatory employer with the requisite high degree of consanguinity to the signatory employer. Assuming that we can successfully negotiate the shoals of *Peter Kiewit* and its offspring, we see no reason why the law developed by the Board and by federal appellate courts in that context should not be the substantive law applied in a suit under section 301 against related employers for breach of a collective bargaining agreement entered into by one of them, at

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(Footnote 10 continued)

See also Forrest Bugher v. Cleveland X-Ray Inspection and Cleveland Indus. Testing, Inc., No. 77-186-B (N.D.Okla. Nov. 22, 1972) (unpublished opinion); *International Union v. Cardwell Mfg. Co., Inc.*, 416 F.Supp. 1267 (D.Kan.1976); *Plumbers Local Union No. 519 v. Service Plumbing Co., Inc.*, 401 F.Supp. 1008 (S.D.Fla.1975), which also held that alter ego type theories may be used to bind a non-signatory to a collective bargaining agreement.

least for the purpose of deciding whether the plaintiffs have failed to state a claim under section 301. Indeed, in view of the common goals of the LMRA and the NLRA and the existence of a substantial body of case law developed by the agency possessing special expertise in the area, there is every reason why the substantive law should be the same.

We recognize that the Board, in an unfair labor practice proceeding involving, e.g., single employer status, is operating under a statutory mandate (in section 9(b) of the NLRA) to determine whether the resulting unit is an appropriate unit and thereby to protect the section 7 rights of the employees involved. But we agree with the district judge that a district court in a section 301 case, although not operating under a specific statutory mandate such as section 9(b), should be similarly concerned about the section 7 rights of the employees. One of the principal policies of the national labor laws—that embodied in section 7—is the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. 29 U.S.C. § 151. If, as the Supreme Court said in *Lincoln Mills*, 353 U.S. at 456, 77 S.Ct. at 917, we are to fashion the law under section 301 from the policy of our national labor laws, we cannot fail to honor and effectuate a policy so basic to those laws as the policy of protecting workers' rights of free association.

The defendants urge that the Unions have failed to state a claim under section 301 against Halmar simply because Halmar did not sign the collective bargaining agreement between Farnsworth and the Unions. But in order to accept this conclusion we would have to disregard

the fundamental policies developed by the Board and by federal appellate courts in the unfair labor practice cases described in Parts II.C.1 and 2 of this opinion. The rights of the Unions and the obligations of Farnsworth and Halmar would then depend upon the forum in which the claims were asserted.

The Supreme Court addressed a similar problem in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974), a suit brought by a union under section 301 to compel Howard Johnson to submit to arbitration to determine the extent of its obligations to the employees of a company whose assets Howard Johnson had purchased. Howard Johnson had specifically refused to assume the selling company's collective bargaining agreement, which contained an arbitration clause. The district court nevertheless ordered Howard Johnson to arbitrate. The district court relied on the Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964), also a case under section 301 to compel arbitration; the court of appeals affirmed. Both the district court and the court of appeals recognized that the reasoning of *Wiley* was to some extent inconsistent with the Supreme Court's later decision in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), but held that *Wiley* rather than *Burns* controlled. The two courts reasoned that *Burns* involved an *NLRB order* holding the successor employer bound by the substantive terms of the collective bargaining agreement with its predecessor (an order which the Supreme Court declined to enforce), whereas *Howard Johnson*, like *Wiley*, involved a *section 301 suit* to compel arbitration.

The Supreme Court rejected the lower courts' reasoning on this point. In its discussion of the issue, the Court said:

> Although this distinction was in fact suggested by the Court's opinion in *Burns*, see [406 U.S.] at 285-286 [92 S.Ct. at 1581], we do not believe that the fundamental policies outlined in *Burns* can be so lightly disregarded. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 [77 S.Ct. 912, 1 L.Ed.2d 972] (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws." *Id.*, at 456 [77 S.Ct. at 917]. MR. JUSTICE DOUGLAS described the process of analysis to be employed:
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> > "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.*, at 457 [77 S.Ct. at 918].
>
> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to

> permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims. Clearly the reasoning of *Burns* must be taken into account here.

417 U.S. at 255-56, 94 S.Ct. at 2239-2240 (footnote omitted). Similarly, we think that it would be inconsistent with the congressional mandate to fashion the law under section 301 from the policy of our national labor laws to say that the policies found controlling in the unfair labor practice context described *supra* may be disregarded by the district court in the present suit under section 301 and thus to permit the rights and obligations of the parties to vary with the forum.

The Court in *Howard Johnson* emphasized that

> [i]n our development of the federal common law under § 301, we must necessarily proceed cautiously, in the traditional case-by-case approach of the common law. Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate.

Id. at 256, 94 S.Ct. at 2240. The same can obviously be said for the single employer-alter ego questions presented by this case. At this preliminary stage of the litigation, and for the purpose of deciding whether the plaintiffs have failed to state a claim, we see no reason why the substantive law to be applied by the district court should differ from that applied by the Board in the unfair labor practice con-

text described *supra*.

This brings us squarely to the question whether, as the district court held, a determination of the appropriateness of the bargaining unit by the district court would be an invasion of the exclusive province of the NLRB "not distinguishable from that condemned by the Supreme Court in the *Peter Kiewit* case." 511 F.Supp. at 513.

5. The Relevance of Peter Kiewit.

The defendants' position is that the plaintiffs' claims against Halmar must fail because the plaintiffs' claim under the single employer theory would require the district court to make a determination of the relevant bargaining unit before the NLRB has done so, and such a premature determination is forbidden by the Supreme Court's decision in *Peter Kiewit*. To hold Halmar (as a single employer with Farnsworth) to the 1977 collective bargaining agreement, say the defendants, it must be determined that Halmar's employees belong to the relevant bargaining unit represented by the Unions. This in turn requires that a determination of the appropriateness of that bargaining unit be made, and according to defendants, *Peter Kiewit* does not allow the federal courts to make *de novo* bargaining unit determinations. The plaintiffs argue in response that *Peter Kiewit* does not forbid such unit determinations in the present section 301 action for breach of contract.

We are in substantial agreement with the plaintiffs' position. As described above, in *Peter Kiewit* the union filed an unfair labor practice charge before the NLRB against a union contractor and a non-union contractor, alleging that they were a single employer and that the contract

entered into by the union contractor was binding on the non-union contractor. The NLRB found that the two contractors were separate employers, thereby obviating the need to inquire into the appropriateness of the bargaining unit, and dismissed the complaint. The Court of Appeals for the District of Columbia Circuit reversed, holding that the two contractors were a single employer. Rather than remanding for a determination by the Board on the appropriateness of the bargaining unit, the court went on to hold that the unit was appropriate and that the two contractors had committed an unfair labor practice by refusing to recognize the union as the bargaining representative of the non-union contractor's employees or to extend to them the terms of the collective bargaining agreement.

The Supreme Court affirmed the circuit court's determination on the single employer issue but vacated its holding that the employees of the two companies constituted an appropriate bargaining unit. The Court held that the circuit court had invaded the statutory province of the NLRB under section 9(b) of the NLRA by proceeding to decide the unit question before the NLRB had passed upon the issue:

> **Whether or not the Court of Appeals was correct in this reasoning, we think that for it to take upon itself the initial determination of this issue was "incompatible with the orderly function of the process of judicial review." *NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438, 444 [85 S.Ct. 1061, 1064, 13 L.Ed.2d 951] (1965). Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, "if not final, is rarely to be disturbed," *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491 [67 S.Ct. 789, 793, 91 L.Ed. 1040] (1947), we think**

the function of the Court of Appeals ended when the Board's error on the "employer" issue was "laid bare." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 [73 S.Ct. 85, 86, 97 L.Ed. 15] (1952).

As this Court stated in *NLRB v. Food Store Employees*, 417 U.S. 1, 9 [94 S.Ct. 2074, 2079, 40 L.Ed.2d 612] (1974):

> "It is a guiding principle of administrative law, long recognized by this Court, that 'an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.' *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 [60 S.Ct. 437, 442, 84 L.Ed. 656] (1940)."

In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under § 9, the Court of Appeals did not give "due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 [60 S.Ct. 437, 440, 84 L.Ed. 656] (1940).

Peter Kiewit, 425 U.S. at 805-06, 96 S.Ct. at 1844-1845.

We do not think that the second sentence in the portion of the opinion quoted above—a sentence which is often quoted out of context—stands for the proposition for which it and *Peter Kiewit* are cited by the defendants—that the Board has exclusive jurisdiction to decide ap-

propriateness of the bargaining unit issues. We think instead that the Court in *Peter Kiewit* was applying a time-honored principle relating to appellate review of an agency determination. When an agency, in order to grant relief in the case before it, must as a matter of statute find that both factual or legal conclusion A (e.g., single employer status) and factual or legal conclusion B (e.g., appropriateness of the bargaining unit) have been established, but concludes that A has not been established and therefore declines to consider whether B has been established, a reviewing court that reverses the conclusion that A has not been established must remand to the agency to permit it to consider in the first instance whether B has been established.

Section 9(b), which is the source of the Board's responsibility in an unfair labor practice context to make a determination of the appropriateness of the bargaining unit in a single employer case such as *Peter Kiewit*, and which is set forth in the Supreme Court's opinion in *Peter Kiewit*, directs the Board to "decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof...." 29 U.S.C. § 159(b) (emphasis added). Clearly section 9(b) refers only to *cases pending before the Board under the NLRA*. Neither section 9(b) nor the Supreme Court's decision in *Peter Kiewit* stands for the proposition that a federal court with jurisdiction under section 301 of the LMRA to decide cases alleging a breach of a collective bargaining agreement by related employers does not have jurisdiction to determine whether a bargaining unit comprising the employees of such employers is appropriate where such a determination is necessary to a resolution of

the breach of contract issue that is consistent with national labor policy.

We note that in the present case there is no indication that either party has been before the Board seeking a certification or clarification of the relevant bargaining unit, nor to our knowledge is any such proceeding presently pending. Were such a circumstance present, our view of the proper role of the federal district court in that case might be very different. We do not deny that deference to the expertise of the Board in unit determinations should be encouraged whenever possible, and upon the initiation of clarification proceedings or the filing of an unfair labor practice by one of the parties to this action, depending upon how far these proceedings had progressed, the wisest course for the district court might well be to stay the action pending the Board's resolution of the unit issue.[11] Nor is this a case in which a unit determi-

[11] We note that no party has raised the issue whether the traditional administrative law theory of primary jurisdiction mmay fruitfully be applied in a case where a bargaining unit issue arises before a district court in a § 301 action. By "primary jurisdiction", we do not mean the pre-emption doctrine developed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 [79 S.Ct. 773, 3 L.Ed.2d 775] (1959), which is applied solely in a labor context; rather, we are speaking of the practice of referring questions within an administrative agency's expertise to that agency while the federal court stays or dismisses the main action pending the agency's determination. The Supreme Court has explained the difference between the two concepts by noting that in the labor law context

> the term "primary jurisdiction" is used to refer to the various considerations articulated in *Garmon* and its progeny that militate in favor of pre-empting state-court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board. This use of the term should not be confused with the doctrine of primary jurisdiction, which has been described by Professor Davis as follows:

nation has been made by the Board and a disgruntled party

(Footnote 11 continued)

> "The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.
>
> "The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue." 3 K. Davis, Administrative Law Treatise § 19.01, p. 3 (1958) (emphasis in original).

While the considerations underlying *Garmon* are similar to those underlying the primary-jurisdiction doctrine, the consequences of the two doctrines are therefore different. Where applicable, the *Garmon* doctrine completely pre-empts state-court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act.

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 199 n.29 [98 S.Ct. 1745, 1758 n.29, 56 L.Ed.2d 209] (1978). The Court has also stated:

> The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. Western Pacific R. Co.*, 352 U.S. 59, 63 [77 S.Ct. 161, 164, 1 L.Ed.2d 126] (1956). Even when common-law rights and remedies survive and the agency in question lacks the power to confer immunity from common-law liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure "[u]niformity and consistency in the regulation of business entrusted to a particular agency" or where
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> "the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by in-

seeks to circumvent it through a *de novo* determination by

(Footnote 11 continued)

> sight gained through experience, and by more flexible procedure." [*Far East Conference v. United States*, 342 U.S. 570, 574-75, 72 S.Ct. 492, 494, 96 L.Ed. 576 (1951).]

Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303-04, 96 S.Ct. 1978, 1986-1987, 48 L.Ed.2d 643 (1976). *See also American Trucking Associations, Inc. v. ICC*, 682 F.2d 487, 491 n.6 (5th Cir. 1982) (collecting cases applying doctrine in varying contexts); *Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503, 519-20 nn.14-15 (5th Cir. 1981); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1109, 51 L.Ed.2d 541 (1977). The question here is whether the district court should require the plaintiffs to seek an initial Board determination of some of their claims before the court hears the case.

We express no opinion on the primary jurisdiction issue, because none of the parties raised or briefed it. We strongly recommend that the issue be briefed, not only by the parties but also by the Board. We will, however, discuss some of the concerns which we believe are relevant to the application of the doctrine to this case.

We note that the House conference report on § 301 states that "[o]nce parties have made a collective bargaining contract [,] the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.Conf.Rep.No. 510, 80th Cong., 1st Sess. 42, U.S.Code Cong.Serv. 1947, 1135, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 546 (1948). The Senate committee report states that "breaches of collective agreement [*sic*] have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Bord when such breaches occur .... We feel that the aggrieved party should also have a right of action in the Federal courts." S.Rep.No. 105, 80th Cong., 1st Sess. 15, *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 at 421 (1948). These statements may or may not be relevant in a case such as this, where one of the issues is whether one party is bound by the contract.

There are two possible ways to present to the Board any issues as to which primary jurisdiction is applied: by filing an unfair labor practice charge under §§ 8(a)(5) & (1) of the NLRA, 29 U.S.C. §§ 158(a)(5) & (1), or by seeking a unit clarification under § 9(c) of the NLRA, 29 U.S.C. § 159(c). The first method presents no problems: any person, even a stranger to the collective bargaining agreement, can bring unfair labor

a federal court under the guise of a section 301 action.[12] In

(Footnote 11 continued)
practice charges. 29 U.S.C. § 160(b); 29 C.F.R. § 102.9 (1981); *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 63 S.Ct. [illegible] 87 L.Ed. 579 (1943); *NLRB v. W. L. Rives Co.*, 328 F.2d 464, 469 [illegible]0 (5th Cir. 1964). Clearly the Board will decide single employer, unit determination, and alter ego questions in such a proceeding: it was in this context that the Board developed the single employer and alter ego theories. *See, e.g., Hageman Underground Construction*, 253 N.L.R.B. 60 (1980) (single employer); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976) (alter ego). Thus, requiring an unfair labor practice proceeding raises no special issues for consideration other than whether it is desirable to require the exercise of primary jurisdiction via a procedure with such pejorative overtones.

The unit clarification procedure is a neutral one, in which the Board will also decide single employer and unit determination issues. *See, e.g., Valmac Indus., Inc.*, 225 N.L.R.B. 1296 (1976); *General Envelope Co.*, 222 N.L.R.B. 10 (1976); *Miami Indus. Trucks, Inc.*, 221 N.L.R.B. 209 (1975). Obviously, the Board will not make an alter ego finding in a unit clarification proceeding, since the alter ego theory does not raise a unit determination issue (except for the limited determination of whether the unit is repugnant to the policies of the NLRA).

It appears, however, that the Funds would not have standing to seek unit clarification, although the Unions would. 29 U.S.C. §§ 159(c), 152(2); 29 C.F.R. §§ 102.60(b), 102.1 (1981). The Supreme Court has stated that the doctrine of primary jurisdiction has no application where the plaintiffs could not invoke administrative action. *Rosado v. Wyman*, 397 U.S. 397, 406, 90 S.Ct. 1207, 1214, 25 L.Ed.2d 442 (1970). *Rosado*, however, did not present a case where some plaintiffs had standing before the agency and others did not, a situation which raises competing concerns of judicial and administrative economy and potential collusion to prevent invocation of primary jurisdiction.

Further, in the event the district court does require prior resort to the NLRB, we note that the court must decide not only which issues should be submitted to the Board, but also whether to dismiss the case or merely stay it. If the court reaches that point, we direct its attention to 3 K. Davis, Administrative Law Treatise § 19.07 (1958, Supp. 1970 & Supp. 1976) and the cases cited therein, particularly *United States v. Michigan Nat'l Corp.*, 419 U.S. 1, 95 S.Ct. 10, 42 L.Ed.2d 1 (1974).

* See page A-94 for corrected Footnote 11.

[12] In *Local Union 204, IBEW v. Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982), a dispute arose between the union and employer over accretion of Quality Control Inspectors (QCI's) into a

that case, as well, the outcome might be very different. We

(Footnote 12 continued)
contractually defined bargaining unit. The employer contended QCI's were managearial or supervisory personnel not includible within the bargaining unit for "employees." The union filed a petition before the Board of accretion, the Board upheld the union's position, and the union was eventually certified as the bargaining representative for the QCI's. The employer then refused to bargain with the union, and the union brought a § 301 action in federal court. The Eighth Circuit dismissed, declaring that the § 301 action was a disguised attempt to obtain review of the Board's bargaining unit determination in a federal district court and holding generally that representational issues were beyond the jurisdiction of federal courts in § 301 actions.

This result may seem surprising, since the union who brought the suit would be the last party who would want a redetermination of the bargaining issue, which had been decided in its favor. Indeed, the union's position in that case would be more likely to be that the Board's determination was conclusive on the parties and the district court should enforce it without review in a § 301 action. Then no bargaining unit determination would have been necessary.

The Eighth Circuit may have based its decision on the idea that the *employer* was seeking review by litigating the unit issue in the federal courts directly instead of in the normal context of review of an unfair labor practice charge for refusal to bargain. *See generally Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed.2d 735 (1971). This may explain the court's remark that the case presented "a suit to obtain review of an NLRB factual finding on a representational issue despite the fact that Congress has established an orderly review procedure under section 10 of the Act." 668 F.2d at 419.

Nevertheless, we confess puzzlement at the Eighth Circuit's decision here, since nothing in the opinion indicates that it was the employer rather than the union who sought to invoke § 301 jurisdiction. Moreover, if a unit determination by the Board is directly reviewable in the federal courts outside of the context of an unfair labor practice charge, then the logical procedure may be not to dismiss the § 301 action because a party requests redetermination or review, but rather simply to accept the unit determination as conclusive and proceed with the breach of contract action.

Thus, while we agree with the Eighth Circuit that the district courts may not be the proper forum for review of section 9 issues already passed upon by the Board, we are not in agreement with its broader holding that federal district courts never have the authority to engage in

have before us a narrow set of circumstances in which neither side has sought to invoke the Board's powers to determine an appropriate bargaining unit, and a federal court is called upon to remedy an alleged breach of contract. We think that in this situation the district court may decide the appropriateness of the bargaining unit, where a decision on that issue is essential to a resolution of a breach of contract claim.

6. Other Relevant Cases.

So great is the congressional commitment to judicial enforcement of contractual rights embodied in section 301 that the Supreme Court has upheld the jurisdiction of the federal courts under section 301 even in the face of the NLRB's exclusive jurisdiction to consider actions alleging unfair labor practices. Thus, pursuant to section 301, federal courts have independent jurisdiction to decide cases alleging breaches of collective bargaining agreements, even though a breach may also constitute an unfair labor practice:

> The strong policy favoring judicial enforcement of collective-bargaining contracts [is] sufficiently powerful to sustain the jurisdiction of the district courts over enforcement suits even though the conduct involved [is] arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board.

(Footnote 12 continued)
unit determinations in § 301 actions. In any event, the case we are presented with here is factually dissimilar, as there is no prior or pending unit determination by the Board, and thus we think does not raise the problems of review of Board determinations which concerned the Eighth Circuit.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976). *Accord, William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 94 S.Ct. 2069, 40 L.Ed.2d 620 (1974); *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); *International Union v. E-Systems, Inc.*, 632 F.2d 487, 490 (5th Cir. 1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1979, 68 L.Ed.2d 298 (1981); *NLRB v. George E. Light Boat Co.*, 373 F.2d 762, 767 (5th Cir. 1967). "Indeed, so severely is the Board limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes." *United Steelworkers v. American International Aluminum Corp.*, 334 F.2d 147, 152 (5th Cir. 1964), *cert. denied*, 379 U.S. 991, 85 S.Ct. 702, 13 L.Ed.2d 611 (1965).

We have seen that in deciding whether a collective bargaining argeement has been breached, the federal courts have been directed by Congress to create a federal common law of contract, fashioned from the policy of our national labor laws, applicable to collective bargaining agreements. *Lincoln Mills, supra* 353 U.S. at 456-57, 77 S.Ct. at 917-918. We are faced here with one of the most fundamental questions that can arise in a contract suit, namely: who is bound by this contract? To say that the courts and not the Board are solely entitled to pass upon contractual disputes and at the same time to deny the courts the power to determine in a fashion consistent with the policy of our national labor laws the identity of the persons or entities obligated by the contract is self-contradictory. If anything, the power to enforce a contract must necessarily include the ability to decide who is bound by the contract. No question is more basic to the existence of contractual rights. Thus to the extent that the identity of the obligees is bound up in representational issues, the

federal courts must be empowered to decide those issues for the purpose of determining contractual rights and obligations.

The language of the Supreme Court's opinions has been quite consistent with this reasoning. In *Connell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), a general contractor sued under the antitrust laws to void an agreement it had entered into with a union whereby the contractor would only hire subcontractors who had collective bargaining agreements with the union. The union defended the agreement on the grounds that such agreements were explicitly made not unfair labor practices by a proviso to section 8(e) of the NLRA and therefore that antitrust policy should defer to labor policy. This circuit held that it could not address the issue since it would first require a decision whether there was an unfair labor practice under section 8(e), and such matters were within the exclusive province of the NLRB. The Supreme Court disagreed, and decided the issue, stating that "[t]his Court has held ... that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626, 95 S.Ct. at 1836 (footnote omitted) (citing *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-688, 85 S.Ct. 1596, 1599-1601, 14 L.Ed.2d 640 (1965) (opinion of White, J.); *id.* at 710 n.18, 85 S.Ct. at 1614 n.18 (opinion of *Goldberg, J.*); Vaca v. Sipes, 386 U.S. 171, 176-188, 87 S.Ct. 903, 909-915, 17 L.Ed.2d 842 (1967); *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962)).

The Court reiterated its *Connell* holding in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 102 S.Ct. 851,

70 L.Ed.2d 833 (1982). There a coal producer sought to avoid payment of special contributions to employee health and retirement funds on the grounds that the clause in the collective bargaining agreement which required the contributions violated the "hot cargo" provisions of section 8(e) of the NLRA, as well as sections 1 and 2 of the Sherman Act. The trustees of the funds brought an action under section 301 and ERISA seeking to enforce the clause of the collective bargaining agreement. Both the district court and the District of Columbia Circuit refused to pass upon the labor issues presented. The Supreme Court held that the federal courts had jurisdiction to pass on the "hot cargo" claim as well as the antitrust claim, since they had "a duty to determine whether a contract violate[d] federal law before enforcing it." 455 U.S. at __, 102 S.Ct. at 859. In a similar vein, we think that a district court has a duty, in deciding under section 301 whether to enforce a collective bargaining agreement, to make that decision in a fashion consistent with the policies embodied in our federal labor laws.

Although *Connell* involved a suit under the antitrust laws, we think its reasoning is applicable to the section 301 claim in this case. Moreover, *Kaiser* was a suit brought under both section 301 and ERISA. Our earlier discussion has adverted to Congress' intent that section 301 provide a contractual remedy independent of those available before the Board. Following *Connell*, we hold that where collateral issues of labor law, such as the determination of the appropriateness of a bargaining unit, become essential to the determination of the existence of a breach of contract under the independent federal remedy Congress created in section 301, a federal court may pass upon the issues under its congressional grant of jurisdiction notwithstanding the fact that a unit determination by the

Board might be available if one of the parties filed an unfair labor practice charge or sought unit clarification.[13]

Moreover, the analysis suggested by *Connell* is even stronger when claims are brought under ERISA. There can be no doubt that ERISA provides a remedial scheme independent of the NLRA. To the extent that col-

[13] Additional support for the proposition that unit determinations may be made by federal district courts in § 301 actions may be found in dicta in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964). In *Carey* a dispute arose between two unions over which was the appropriate bargaining representative for a certain group of employees. The collective bargaining agreement between the petitioner union and the employer, Westinghouse, included a grievance procedure for the use of arbitration in the case of unresolved disputes concerning the "interpretation, application or claimed violation" of the agreement. *Id.* at 262, 84 S.Ct. at 404. The union sued the employer to compel arbitration on the question of work assignments as between the two unions. The employer refused arbitration, claiming that the issue was in reality a representational issue within the exclusive province of the Board. The Supreme Court held that the district court had jurisdiction to enforce the arbitration clause even though the resulting arbitration might touch upon representational matters, and stated in addition:

> If this is truly a representation case, either IUE or Westinghouse can move to have the certificate clarified. But the existence of a remedy before the Board for an unfair labor practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in *Smith v. Evening News Assn.*, 371 U.S. 195 [83 S.Ct. 267, 9 L.Ed.2d 246]. We think the same policy considerations are applicable here; and that a suit either in the federal courts, as provided by § 301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. § 185(a); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 [77 S.Ct. 912, 1 L.Ed.2d 972]), or before such state tribunals as are authorized to act (*Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 [82 S.Ct. 519, 7 L.Ed.2d 483]; *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 [82 S.Ct. 571, 7 L.Ed.2d 593]) is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him.

375 U.S. at 268, 84 S.Ct. at 407.

lateral labor law issues arise in the course of an ERISA claim, the federal courts should be empowered to decide them. This is especially so since it is not necessarily the case that the plaintiffs in an ERISA action will always be proper parties to a unit clarification petition before the Board.[14]

The leading case taking a position contrary to ours is *Local No. 3-193, International Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980). In *Ketchikan*, a union and employer had signed a collective bargaining agreement; article I of this agreement recognized the union as the exclusive bargaining representative for all employees of various classifications at the employer's logging operations in southeastern Alaska. At the time the agreement was entered into the employer had one such logging operation; during the term of the agreement, the employer acquired several other logging operations in southeastern Alaska, but refused to recognize the union as the representative of the employees at those operations. Neither party sought relief from the NLRB. Instead the union filed an action, eventually transferred to federal court, under section 301, alleging a breach of the collective bargaining agreement.

The Ninth Circuit, while recognizing that *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964), permitted arbitration as "an appropriate alternative process for the resolution of representation issues," nevertheless found that "there is a very, very strong policy of self-determination using the procedures vested in the NLRB ...." 611 F.2d at 1298-99. The

[14] *See* note 11 *supra* for a discussion of standing in unit clarification proceedings.

court characterized the plaintiff union's suit as an accretion case in disguise, in which

> the Union is attempting an end run around Section 9 of the Act and under the guise of contract interpretation wants to avoid self-determination of a bargaining agent by a substantial number of employees and determination of an appropriate bargaining unit by the NLRB, which has primary authority in this area. This cannot be countenanced.

Id. at 1299-1300. The court in *Ketchikan* saw the union's suit as an attempt to enforce an accretion clause, as is clear from it reliance on cases such as *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352 (9th Cir. 1970), and *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778 (5th Cir. 1973). The concern of the court is clearly stated in its opinion: accretion of the employees in the newer logging camps without an election to determine majority status would threaten a usurpation of section 7 rights. The decision in *Ketchikan* is interesting because, after its broad language stating its conclusion that "Congress did not intend by enacting Section 301 to vest in the courts initial authority to consider and pass upon questions of representation and determination of appropriate bargaining units," 611 F.2d at 1301, the court did not simply dismiss the action. Instead, it stated:

> **The court does have jurisdiction to interpret Article I of the labor agreement between these parties. If it was the intention of the parties that said agreement be determinative of the appropriate bargaining area and unit, as applied to the independent logging camps (employees) outside Thorne Bay, Alaska, it is illegal and unenforceable. If it was the intention of the parties**

> that said agreement be authority for the plaintiff to act as the collective bargaining agent for employees in logging camps outside Thorne Bay, Alaska, it is illegal and unenforceable. The sole operative effect, outside Thorne Bay, Alaska, of Article I of the agreement is to waive Ketchikan's right to demand an election as a method of proving majority support.

Id. The court then reversed the district court's dismissal of the section 301 action and remanded for further proceedings. Our view is that if the court decided that the contract did not make members of all the logging camps members of the same bargaining unit, it had already passed on an issue with representational overtones. If the court had no jurisdiction over representational matters and foresaw that its decision of the section 301 claims would require passing on such matters, its proper course would have been to dismiss without deciding anything. It did not do so, however, and we believe this fact belies its broad language about section 301 jurisdiction. In one sense the court's action here is reminiscent of the Supreme Court's decision in *Kaiser Steel v. Mullins,* discussed above, in which the Court felt compelled to decide the legality of a contractual provision notwithstanding the fact that this required determination of whether the provision authorized an unfair labor practice. To the extent that *Ketchikan* may be so viewed, it is actually consistent with the views we have expressed above.

In any case, the single employer theory we have discussed in this opinion does *not* rely on enforcement of any accretion clause in a collective bargaining agreement. The theory first requires a showing that the two subentities are a single employer and then requires a further

independent determination that their employees constitute an appropriate bargaining unit. In fact, the presence of any contractually stipulated bargaining unit in the collective bargaining agreement of the union company is wholly irrelevant to the finding of single employer status. Once a finding of single employer status is made, the Board (or the district court in a section 301 context) must then consider the existence of a community of interests between the employees in both subentities. This is absolutely necessary in order to preserve the employees' section 7 rights—rights which are firmly embedded in the national labor policy. The fact that an accretion clause might be present cannot settle the matter, and the Board and the courts have given little deference to such clauses. *See* note 17, *infra*. The decision that the employees of the two subentities constitute an appropriate unit is thus crucial to liability under the single employer theory we have outlined above. We agree with *Ketchikan* that this determination cannot be disguised in contractual garb but must be encountered head-on as a bona fide representational issue. But we also think that where such an issue is essential to the disposition of contractual rights in a section 301 action in a fashion consistent with the policy of our national labor laws, a district court has the power to decide it, at least in the absence of a previous or pending determination by the Board.

We do not think our own cases are contrary to this result. *Florida Marble Polishers Health and Welfare Trust Fund v. Edwin M. Green, Inc.*, 653 F.2d 972 (5th Cir. 1981), *cert. denied*, __ U.S. __, 102 S.Ct. 2235, 72 L.Ed.2d 846 (1982), discussed at note 17, *infra*, also invalidated a recognitional clause which a union sought to use to achieve an accretion without the need for a representational election. The court rejected use of the recognitional clause by itself to usurp section 7 rights, and also took pains to point

out that neither a single employer or alter ego situation existed between the enterprises involved. 653 F.2d at 975-77. Thus we think its result entirely consistent with the views we express today.

In *West Point-Pepperell, Inc. v. Textile Workers Union*, 559 F.2d 304 (5th Cir. 1977), the employer, West Point, brought an action for declaratory and injunctive relief under section 301 after the union who was a party to its collective bargaining agreement, TWUA, merged into another union, ACTWU. West Point refused to bargain with ACTWU or pay dues to it, and sought a declaration that it was not bound under the contract to do so, since only TWUA could be the exclusive bargaining agent of its employees. After suit was filed, the surviving union (ACTWU) filed a petition with the NLRB for amendment of certification to reflect the merger and asked that the section 301 suit be dismissed or stayed pending disposition of the proceedings before the Board. On appeal, this court dismissed, stating that the question of who was the proper representative of West Point's employees under the contract was a matter for the Board's exclusive authority.

Two factors are inportant in understanding the result in *West Point-Pepperell*. First, during the district court's consideration of the section 301 claim, the controlling representational issue was simultaneously pending before the Board, a circumstance which is not present in this case.[15] Thus the decision in *West Point-Pepperell* is thoroughly consistent with our views and our disposition; the latter, as we have said before, only purports to deal with the situation where no action by the Board has taken

[15] By the time the case was decided by the court of appeals, the Regional Director of the NLRB had granted ACTWU's petition for amendment of certification. 559 F.2d at 307 n.1.

or is taking place at all. Moreover, the decision in *West Point-Pepperell* sought to limit its holding to issues of union identity, as opposed to employer identity, which is the concern of this case:

> In arguing that the district court has concurrent jurisdiction over these questions, the plaintiff relies on cases in which the district courts decided contests concerning successor employers under collective bargaining agreements. However, the determination of the successorship of unions differs significantly from that of employers. Federal labor laws are designed to assure and protect the fair representation of employees in labor disputes, and the selection of the employees' exclusive bargaining agent is a fundamental step in that process. Under Section 159 of the Act, Congress vested the NLRB with the exclusive authority to make the factual finding regarding the representative status of labor organizations. It is clear that wherever there is a change in the representation of a union, the board, and not the courts, is the proper body to reassess the change.

Id. at 307.

In conclusion, we hold that a section 301 claim for breach of contract may be stated either under an alter ego theory or under a single employer theory, and that in the latter case, a district court has jurisdiction to address the issue of the appropriateness of the bargaining unit, which is essential to success on that theory.

7. Majority Status.

The defendants argue that even if *Peter Kiewit* poses

no problems for the plaintiffs, there is still a major obstacle to the latter's ability to state a claim for relief under section 301 using either the single employer or alter ego theories. That obstacle is the fact that, according to defendants, the 1977 collective bargaining agreement is totally unenforceable until the Unions demonstrate majority status in the relevant bargaining unit. Understanding this problem, however, requires a brief explanation of the nature of prehire agreements such as the one involved in the present litigation.

Section 8(f) of the NLRA, 29 U.S.C. § 158(f), permits an employer engaged in the building and construction industry to enter into a prehire agreement with a labor organization before the majority status of the organization has been established. Ordinarily, an agreement recognizing a union as the exclusive bargaining representative of an employer's work force when in fact only a minority of employees have authorized the union to represent their interests would constitute an unfair labor practice. *NLRB v. Local Union 103, International Association of Bridge Workers (Higdon Construction Co.)*, 434 U.S. 335, 344, 98 S.Ct. 651, 657, 54 L.Ed.2d 586 (1978); *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737, 81 S.Ct. 1603, 1607, 6 L.Ed.2d 762 (1961). This is because such an agreement would violate the guarantee of section 7 of the NLRA, 29 U.S.C. § 157, that employees shall have the right to bargain collectively with representatives of their own choosing. Section 9(a), 29 U.S.C. § 159(a), requires that the bargaining agent for all employees in the appropriate bargaining unit must be the representative "designated or selected for the purposes of collective bargaining by the majority of the employees ...." Section 8(f) is an exception to the general rule. It was designed

> to meet specific problems which had arisen in the construction industry under the prior law because of the transitory nature of the employer-employee relationship in that industry.... [P]re-hire agreements which would otherwise be invalid were authorized in the construction industry because of the dual necessities (1) that construction bidders know in advance of bid what their labor costs would be, and (2) that construction employers have access to an available pool of skilled craftsmen for quick reference.

NLRB v. Irvin, 475 F.2d 1265, 1267 (3d Cir. 1973). A panel of this circuit has noted however, that "[t]he exception is limited ... by a concern for protecting the employees' section 7 rights: the prehire agreement attains the status of a collective bargaining agreement ... only upon a showing that the union enjoys majority support in the relevant bargaining units." *Baton Rouge Building & Construction Trades Council v. E. C. Schafer Construction Co.*, 657 F.2d 806 (5th Cir. 1981). Moreover, the existence of a prehire agreement in no way bars either the employer or the union from calling for a bargaining representative election at any time. *Higdon*, 434 U.S. at 345, 98 S.Ct. at 657; 29 U.S.C. § 158(f) (proviso that no prehire agreement shall bar a petition filed pursuant to 29 U.S.C. §§ 159(c) and (e)).

The foregoing discussion of prehire agreements noted that such agreements ripen into fully enforceable collective bargaining agreements upon demonstration of a union majority. A question of some controversy is what force and effect the agreements have prior to that time. On the one hand, enforcement of provisions in an agreement with a minority union may potentially undercut the employees' section 7 rights of self-determination; on the other hand, holding the agreements totally unenforceable

may permit employers to reap the benefits of a prehire agreement while avoiding any concomitant obligations.

In *Higdon Construction Co., supra*, the Supreme Court held that a prehire agreement between a union and employer did not protect the former from section 8(b)(7)(C) of the NLRA, 29 U.S.C. § 158(b)(7)(C), which prohibits picketing by a union that is not the authorized bargaining representative unless the union petitions the Board for a representation election within 30 days. The Supreme Court held that a section 8(f) prehire agreement is only a preliminary step in the creation of a collective bargaining relationship, and the agreement is voidable until majority status is reached. 434 U.S. at 341, 98 S.Ct. at 655. Hence the union could not treat the contract in the same fashion as a fully operational collective bargaining agreement and engage in recognitional picketing with impunity.

Higdon arose in the context of an unfair labor practice charge filed by the employer; it thus did not directly address the purely contractual obligations of the parties. Lower courts have divided on the questions of when and to what extent a prehire agreement may be enforced in a breach of contract action before the attainment of majority status. *See generally Todd v. Jim McNeff, Inc.*, 667 F.2d 800 (9th Cir.), *cert. granted*, __ U.S. __, 102 S.Ct. 3508, 73 L.Ed.2d 1382 (1982) (analyzing the various theories and collecting cases). In *Baton Rouge Building and Construction Trades Council v. E. C. Schafer Construction Co.*, 657 F.2d 806 (5th Cir. 1981), we held that a prehire agreement to contribute fringe benefits was totally unenforceable until the date majority status was obtained. On the other hand, the Ninth Circuit has held in *Todd, supra*, that the fact that a prehire agreement is "voidable" under *Higdon*, 434 U.S. at 431, 98 S.Ct. at 655, means that it is enforce-

able until the employer specifically repudiates it (assuming, of course, that majority status still has not been reached by that point).

As certiorari has recently been granted in *Todd* to resolve the conflict in the circuits, it is fortunate that we need not pass on the enforceability questions presented here. We are concerned only with the question whether there is some set of facts, which, if proved, would entitle the plaintiffs to the relief requested, and the pleadings do not allege either majority status or its absence. If, upon factual development of the case, the plaintiffs can demonstrate that appropriate majority support exists or has existed, we do not think our holding in *Schafer* would *per se* bar the claims. Majority status issues may of course assume considerable importance later on in the course of this litigation, but at present we are unable to say that there is no set of facts with regard to majority status which, if proved, would entitle the plaintiffs to relief.

8. The Relevance of a Unit Stipulation.

Since we have held that a district court deciding a section 301 case may determine whether a bargaining unit is appropriate where a decision of that issue is essential to a resolution of a breach of contract claim, the plaintiffs' alternative argument that such a determination may not be necessary in this case loses its urgency. However, since the district court on remand will be applying, as the substantive law under section 301, the law developed by the Board in a similar context, it may be worthwhile to note briefly some of the circumstances under which no unit determination by the district court may be necessary. We have seen that prehire agreements become fully enforceable upon a demonstration of majority status in the appro-

priate bargaining unit. A natural question, then, arises as to how that bargaining unit is to be determined. One situation that often obtains is that the prehire agreement itself contains a description of the relevant unit agreed to by the union and the employer (or employers in the case of a multi-employer agreement). To give an example, the excerpts from the three collective bargaining agreements submitted by defendants to accompany their motion to dismiss[16] contain the following provisions:

> ARTICLE I—RECOGNITION
>
> *Section 1.* The Contractors, during the life of this Agreement, recognize the Unions as the exclusive bargaining representatives for all employees coming under the jurisdiction of the Unions for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.
>
> ARTICLE II—SCOPE OF AGREEMENT
>
> *Section 1.* The geographical scope of this Agreement shall be that part of the territory of the Carpenters District Council of New Orleans and Vicinity covered by the signatory Local Unions affiliated with the Carpenters District Council of New Orleans and Vicinity, as outlined on a map marked Appendix "D", attached hereto.

1 Rec. 50, 90.

[16] We emphasize that since we deal with a Rule 12(b)(6) dismissal, these provisions, which appear outside the pleadings, cannot be used to prove a matter of fact, and we list them only as examples of how a contractually agreed bargaining unit is arrived at. The pleadings are silent about the existence or nonexistence of a predetermined bargaining unit.

Such an informal stipulation is by no means uncommon and is, in the context of a prehire agreement, a perfectly natural occurrence. After all, the employer or employers seek a stable source of employees within a given geographical area; the union seeks eventual responsibility for representing a certain class of employees. Moreover, such agreements are not confined to situations involving prehire agreements. As one commentator has expressed it:

> [A] determination of the appropriate bargaining unit by the National Labor Relations Board is not a prerequisite to bargaining; an employer and a union are in most instances free to agree informally upon an appropriate unit and upon the commencement of bargaining for the employees in that unit.

R. Gorman, *Basic Text on Labor Law 66* (1976).

The Board will of course become involved in representation questions when it is requested to do so by the parties because there is a dispute over the proper bargaining unit. Our point, however, is that often there is no dispute, and in such cases a bargaining unit determination by the Board is totally unnecessary.[17]

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[17] Indeed, not only is a bargaining unit determination often made unnecessary by a stipulation, but in addition, the existence of a stipulation may restrict the Board's authority to make a *de novo* bargaining unit determination. For example, when a union or employer files a petition requesting a representation election, and the parties have stipulated beforehand as to the relevant bargaining unit, the Board's powers are greatly circumscribed: "it's function is limited to construing the agreement under contract principles, and its discretion to fix the appropriate bargaining unit is gone." *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 365 (2d Cir. 1966). The Board is not free to use its expertise to create a bargaining unit acording to its standard method of determining the community of interests. Rather, the stipulation must be accepted unless it would violate applicable statutes or settled Board policy. *NLRB v.*

In the present case, the plaintiffs argue that the

(Footnote 17 continued)
Mercy Hospitals, Inc., 589 F.2d 968 (9th Cir. 1978), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 458 (1979). *Accord, NLRB v. Oritz Funeral Home Corp.*, 651 F.2d 136 (2d Cir. 1981), *cert. denied*, __ U.S. __, 102 S.Ct. 1445, 71 L.Ed.2d 659 (1982); *Methodist Home v. NLRB*, 596 F.2d 1173 (4th Cir. 1979); *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir.), *cert. denied*, 389 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967); *cf. Knapp-Sherrill Company v. NLRB*, 488 F.2d 655, 659 (5th Cir.), *cert. denied*, 419 U.S. 829, 95 S.Ct. 50, 42 L.Ed.2d 53 (1974) (stipulation controls unless its provisions are repugnant to the NLRA or its policies, but where stipulation contains an ambiguity, and absent clear evidence of parties' intention to apply some other test, resolution of ambiguity could be made by application of community of interests test and Board's "wide discretion" is restored for the purposes of such resolution). Our point in giving these examples is to emphasize that although some cases have spoken in broad language about the primary and exclusive jurisdiction of the Board in representational matters, such language does not militate against the powers of the parties to agree among themselves on an appropriate bargaining unit; the question of the exclusivity of the Board's jurisdiction in these matters arises only in cases where there is a dispute between the parties.

We do not think that our decision in *Florida Marble Polishers Health and Welfare Trust Fund v. Edwin M. Green, Inc.*, 653 F.2d 972 (5th Cir. 1981), *cert. denied*, __ U.S. __, 102 S.Ct. 2235, 72 L.Ed.2d 846 (1982), contradicts our decision in *Knapp-Sherrill, supra*. In *Florida Marble Polishers* we were faced with two separate businesses, one which had been a union shop since 1950, and another non-union company formed in 1965. The president of the union company also was president and majority owner of the non-union company. The plaintiff unions in that case sought to bind the non-union company to a 1971 collective bargaining agreement entered into with the union company, based upon what was, in effect, an accretion clause. This court held that enforcing such a clause would be a usurpation of the non-union employees' § 7 rights and the NLRB's exclusive jurisdiction to determine the appropriate bargaining unit. 653 F.2d at 976.

The decision is consistent with previous cases recognizing that "[t]he Board has taken an extremely narrow view of permissible contractual accretions," *e.g., Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 796 (5th Cir. 1973), and with the fact that the federal courts have shown great deference to the Board's decision to refuse accretion even in the face of an accretion clause in an otherwise valid collective bargaining agreement. *Id.* at 797. *Compare Sheraton—Kauai Corp. v. NLRB*, 429 F.2d 1352, 1356-57 (9th Cir. 1970) *with NLRB v. Appleton*

appropriate bargaining unit is not contested by either party and has been contractually determined by the collective bargaining agreement. Based on the pleadings, we cannot tell whether this is or is not in fact the case. But if, upon further factual development, it turns out to be the case that Farnsworth and the Unions have stipulated as to the appropriate bargaining unit in the collective bargaining agreement between them, then the role of the district court will be more limited. As noted in Part II.C.2 of this opinion, if the district court finds that the plaintiffs have met the extremely stiff burden of proving that Halmar is the alter ego of Farnsworth, the district court will not be required to reconsider the unit under the community of interests test, but will simply make the far more limited determination whether the stipulated unit is repugnant to any policy embodied in the NLRA. If, on the other hand, the plaintiffs fail to establish that Halmar is the alter ego of Farnsworth but do succeed in establishing that Farnsworth and Halmar are a single employer, then the district court's function with respect to the appropriateness of the unit as regards Farnsworth's employees is limited in the

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(Footnote 17 continued)
Electric Co., 296 F.2d 202 (7th Cir. 1961) (disagreeing over Board's authority to disregard accretion clauses). All we need point out is that *Tidewater, Knapp-Sherrill*, and other related cases involved stipulations made prior to representation elections which would ultimately vindicate the employees' § 7 rights. In contrast, the situation usually posed in the accretion clause cases is a union majority already established in one area which seeks to swallow up another separate group of employees without the need for an election. This strongly implicates basic principles of national labor policy; a cautious concern for § 7 rights becomes essential and the Board's role is appropriately enlarged. *See generally Kaynard v. Mego Corp.*, 484 F.Supp. 167, 172 (E.D.N.Y.), *modified*, 633 F.2d 1026 (2d Cir. 1980). Where, as here, it is postulated that the union and employer have entered into a prehire agreement which will flower into full enforceability upon a showing of majority status in the stipulated bargaining unit, the problems of accretion are not, for the present, at issue.

same way as the Board's function is limited. However, because the section 7 rights of the employees of both Farnsworth and Halmar are potentially threatened if the recognition clause in the Farnsworth-Union agreement is applied to a unit comprising the employees of both, an independent determination into the appropriateness of that unit must be made by the district court before Halmar will be bound to that agreement.

III. THE ERISA CLAIMS

Both the Unions and the Funds bring claims under ERISA, 29 U.S.C. §§ 1001-1461; they claim that "the defendants" have failed to make proper contributions to the pension, health, and welfare benefit funds on behalf of their employees which were required by the collective bargaining agreement between Farnsworth and the Unions. The statute states that:

> (a) A civil action may be brought—
> (1) by a participant or beneficiary—
>
> * * * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan....

29 U.S.C. §§ 1132(a)(1)(B), (3).

Defendants have not contested the standing of the Unions or the Funds under section 1132 and we assume without deciding that they are participants, beneficiaries, or fiduciaries within the meaning of that section. *Cf. International Association of Bridge Workers, Local No. 111 v. Douglas*, 646 F.2d 1211, 1214 (7th Cir.), *cert. denied*, 454 U.S. 866, 102 S.Ct. 328, 70 L.Ed.2d 166 (1981).

The district court held that the ERISA claims failed as to AGC-New Orleans and AGC-At Large because they were not signatories to the collective bargaining agreement, and the plaintiffs have not contested the dismissal as to these two defendants. Because the claims have been abandoned as to these two defendants, we express no opinion on the correctness of the district court's holding. However, the district court also dismissed the ERISA claims against Halmar and Farnsworth, and the plaintiffs do contest these dismissals.

The district court apparently dismissed the ERISA claims against Farnsworth because it assumed that the pleadings only complained of failure to contribute on behalf of Halmar's employees. 511 F.Supp. at 514. As we have pointed out above, this is too narrow a reading of the claim that the defendants have not made required contributions. Dismissal on this ground was premature and we think that the plaintiffs should be given a chance to prove that Farnsworth did not contribute benefits on behalf of those employees who everyone agrees are Farnsworth's own.

As to Halmar, the court applied the same type of analysis it had employed in dismissing the section 301

claim against Halmar:

> The Court's analysis of the Section 301 allegations is equally applicable in the ERISA context. Accordingly, the alleged ERISA liability could only arise if *Farnsworth* and *Halmar* are not only a "single employer" but, in addition, constitute a single bargaining unit. As this status decision is relegated to the N.L.R.B., plaintiffs cannot have it decided by the Court in the first instance.

511 F.Supp. at 514-15 (emphasis in original). The court then dismissed the ERISA claims against Halmar. *Id.*[18] We agree that the analysis of the section 301 allegations involved here will be generally applicable to the ERISA action based on the same circumstances. However, since our analysis of the section 301 allegations differs from that of the district court, naturally so does our view of the ERISA claims.

We are here concerned with the question whether there has been a breach of a contractual duty to provide benefits to Farnsworth's employees. In our view, if the plaintiffs can show that Halmar is a sham, a disguised continuance used by Farnsworth to escape its obligations under the collective bargaining agreement and ERISA, they can succeed in their claims against Halmar. Because the pleadings, liberally construed, allege this theory, the plaintiffs state a cause of action under ERISA as well as section 301. Moreover, since we are of the opinion that a finding that Halmar and Farnsworth are a single employer and that their employees constitute an appropriate bargaining unit would make contractual obligations to

[18] The district court also dismissed these claims for failure to exhaust contractually mandated grievance procedures; we deal with this question in the next section *infra*.

contribute benefits on behalf of employees binding on Halmar, an ERISA cause of action is also stated based on this theory as well.[19]

IV. EXHAUSTION OF CONTRACTUALLY MANDATED GRIEVANCE PROCEDURES.

The district court gave as an alternative ground for dismissal of the plaintiffs' complaint the failure by the Unions and the Funds to exhaust grievance procedures outlined in the collective bargaining agreement covering the period May 1, 1977 to April 30, 1980. The defendants submitted selected pages from this agreement along with their motions for dismissal and summary judgment.[20]

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[19] As we remand this case to the district court for factual development of the ERISA claims, we add a few words about the relevance of *Higdon Construction Co., supra.* We have explained earlier that this case involves a prehire agreement whose enforceability may turn upon the existence of majority status. The district court should carefully consider whether lack of majority status is a defense against the third party beneficiary of a prehire agreement (the Funds) as well as against the Unions, or whether the doctrine of *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960), applies to this defense. *Compare Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F.Supp. 816 (D.D.C. 1980), *rev'd*, 681 F.2d 1, (D.C.Cir. 1982) (trust fund cannot sue employer pursuant to prehire agreement to recover delinquent contributions absent proof of the union's majority status) *with Trustees v. Southern Stress Wire Corp.*, 509 F.Supp. 1097 (N.D.Ga.1981) (holding that *Benedict Coal* doctrine prevents employer from asserting defense against fringe benefit funds and citing legislative history critical of result in *Washington Area Carpenter's Welfare Fund, supra*). *But cf. Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982) (defense of illegality of a collective bargaining agreement is a defense against a union trust fund). Our decision in *Schafer, supra, holding that Higdon* makes prehire agreements unenforceable until majority status is reached, does not speak directly to the *Benedict Coal* question, since *Schafer* involved a suit brought only by the union signatories and not by trustees of pension funds.

[20] The portions of the submitted materials dealing with grievance procedures are reproduced below:

Accompanying the portions of the agreement was an

(Footnote 20 continued)

ARTICLE XXIII—DISPUTES AND GRIEVANCE PROCEDURE

Section 1. Whenever a dispute involving an alleged claim of a violation of a particular provision of this Agreement, other than an alleged violation of Article III occurs, serious efforts shall be made by the parties in dispute to arrive at a settlement.

Section 2. If the parties to such dispute cannot reach a settlement, either party may refer the dispute to the New Orleans District, Associated General Contractors of Louisiana, Inc. and the Union, whose representatives shall meet within forty-eight (48) hours after the referral of a dispute to them and attempt to settle same.

Section 3. If the Union and the Associated General Contractors' representatives are unable to settle the dispute, either party may refer the matter to arbitration.

Section 4. The arbitrator's decision shall be final and binding upon all parties.

Section 5. The panel of arbitrators from which the arbitrator for a particular dispute will be chosen is as follows:

(1) John F. Caraway
(2) F. Jay Taylor
(3) Harold R. Ainsworth
(4) Samuel J. Nicholas, Jr.

The arbitrator for a given dispute will be selected according to the order in which the arbitrators are listed above. The panel will rotate each time it is exhausted. Rotation of the panel will occur only for arbitrations involving the signatory Contractors.

Section 6. The arbitrator shall have no authority to add to, subtract from, to [*sic*] modify any of the terms or conditions of this Agreement.

Section 7. An employee who believes he has a grievance against his employer must file in writing with the Union which represents the employee a statement setting forth the basis for his complaint. Such statement must be filed within

affidavit from H. Pratt Farnsworth, Jr., president of Pratt-Farnsworth, Inc. In this affidavit, Farnsworth stated that "[a]t no time did any of the Plaintiffs in the instant lawsuit bring or attempt to bring a grievance on the matters which are the subject of this lawsuit."

It is clear from the district court's opinion that these matters, which were outside of the original pleadings, were considered by the court and were a basis for its decision. Hence we must view the district court's disposition of these claims as the grant of a motion for summary judgment. Such a motion is proper only where there are no matters open to factual dispute. In the present case we think such a holding was premature.

We first note that by the terms of the agreement the grievance procedures are applicable with respect to alleged claims of violation of a particular provision of the

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(Footnote 20 continued)

five working days of the occurrence of the event which gave rise to his grievance; otherwise, his grievance or dispute shall be considered finally settled and waived.

Section 8. In the event a dispute should not be referred to arbitration within thirty (30) days after the occurrence of the event which gave rise thereto, the dispute or grievance shall be considered finally settled and waived. A dispute shall be considered referred to arbitration at the time the grieving party notifies the appropriate arbitrator of the dispute and the fact that the parties are unable to settle the disputed issues without resorting to arbitration. This notification shall be in writing and a copy thereof sent to the other party to the dispute, the Union and the New Orleans District, Associated General Contractors of Louisiana, Inc. The time limits imposed under this section may be extended for any particular dispute upon mutual agreement of the parties thereto.

1 Rec. 57-8, 97-8.

agreement, other than article III. Unfortunately, defendants did not provide us with a copy of article III, so we are unable to discover what subjects are in fact excluded from the arbitration provisions of the agreement. Second, we find that the language of sections 2, 7 and 8 of the agreement raises questions of interpretation and possible waiver which we do not think were adequately addressed by the district court. Section 7 states that an employee with a grievance *must* file it in writing with the union within five working days of the occurrence of the event giving rise to the grievance or risk waiver. Section 2 says that any party (including, it is presumed, the Unions themselves) *may* resort to arbitration and the other party is then required to arbitrate the matter. However, section 8 provides that failure to refer a grievance to arbitration within thirty days after it occurs results in waiver of the grievance. The record does not show an invocation of grievance mechanisms by any of the parties to this litigation. The district court's opinion does not appear to have considered the effect of the seemingly non-mandatory language of the arbitration provisions as they relate to parties who are not employees coupled with the language of section 8 regarding waiver. We think the failure to address these issues together with the incomplete nature of the record before us and before the district court made summary disposition inappropriate.

We express no opinion on the outcome of these issues. We do think that on remand the district court should closely examine the language of the entire contract. We also think that the district court should separate for purposes of analysis (1) the Unions' claims against Farnsworth, (2) the Unions' claims against Halmar, and (3) the Funds' claims against both defendants. As to the distinction between (1) and (2), we note that the arbitrability of a

claim that contributions are not being made on behalf of employees who no one contests belong to Farnsworth may involve very different issues from the question of arbitrability of a claim of non-payment on behalf of employees where it is disputed in the first place whether the employees are in fact employed by a party who is bound by the terms of the agreement. In this regard a significant problem is raised by Halmar's denial that it can in fact be bound by arbitration provisions in a collective bargaining agreement it claims it never signed. *Compare International Union of Operating Engineers, Local 279 v. Sid Richardson Carbon Co.*, 471 F.2d 1175, 1177-78 (5th Cir. 1973) (even standard of "arguable arbitrability" which favors arbitration in the doubtful case does not justify construing arbitration clause of limited scope into one which permits arbitration of representation questions, especially where history of bargaining relationship refutes an intent to arbitrate such questions), *with Local No. 6, Bricklayers International Union v. Boyd G. Heminger, Inc.*, 483 F.2d 129 (6th Cir. 1973) and *Iron Workers, Local 790 v. Bostrom-Bergen*, 105 L.R.R.M. 2633 (N.D. Cal.1980) (ordering arbitration where unions sought to compel arbitration with non-signatory alter ego employer because it was identical with signatory employer). On the one hand, the Unions' claim that Halmar and Farnsworth are one might, on the logic of the last two cases, seem to preclude the Unions from claiming that they need not attempt to arbitrate with what they claim is one party fully bound by the agreement. On the other hand, these last two cases involved situations in which the unions *sought* arbitration with non-signatories because they claimed the non-signatories were none other than the signatory employers, while the instant case involves a non-signatory *demanding* that a union seek arbitration while at the same time *denying* that it (the non-signatory) could be bound by such arbitration, as it was

not a party to the collective bargaining agreement. *see Teamsters Local Unions v. Braswell Motor Freight Lines, Inc.*, 395 F.2d 655, 656 (5th Cir. 1968). Our point is that the question of arbitrability of the Unions' claims against Halmar involves issues not present in the arbitrability question with respect to contributions made by Farnsworth on behalf of what everyone acknowledges are Farnsworth's employees. Although the respective answers to the two questions may or may not be the same (an issue we specifically do not decide), the paths of those answers must be very different.

A further distinction in analysis must also be observed in the question whether the Funds must exhaust contractually mandated grievance procedures with respect to the section 301 claims, the ERISA claims, or both. The Funds, after all, were not signatories to the collective bargaining agreement under anyone's view of the matter. The district court believed that if the Unions were required to exhaust contractual grievance remedies, the Funds would be equally obligated to do so. As we remand the questions of the Unions' obligation back to the district court, we do likewise with the question of the obligation of the Funds. The district court may then examine afresh whether the Unions and the Funds must be dumped into the same hopper for exhaustion purposes.[21]

[21] This question is presently being considered by a panel of this court. *Forrest Bugher v. Consolidated X-Ray Service Corp.*, 515 F.Supp. 1180 (N.D.Tex.1981) (appeal pending as No. 81-1349). Assuming that the Funds are required to exhaust, the court still must consider whether, because the Funds may not be in the same position as the Unions to invoke the contractually mandated grievance procedures, the waiver provisions contained in the agreement would be equally applicable to the Funds.

V. THE ANTITRUST CLAIMS.

The plaintiffs have made numerous allegations in their original complaint to the effect that the four named defendants in this case have engaged in an unlawful combination and conspiracy in restraint of interstate commerce and trade in violation of the Clayton and Sherman Antitrust Acts. The chief theme running throughout these allegations is that the defendants have entered into agreements among themselves and with construction employers in the New Orleans area to hire only non-union contractors and subcontractors. The plaintiffs complain that the defendants' actions have undermined the collective bargaining agreements in effect between the Unions and construction employers, resulting in reduced work opportunities, lower wages, less favorable working conditions, and a diminution in fringe benefits for the Unions' members.

The district court dismissed the plaintiffs' antitrust claims for two reasons. First, it concluded that the defendants' conduct fell within the nonstatutory labor exemption to the antitrust laws. 511 F.Supp. at 515-18. Second, the court expressed doubt whether the alleged acts of the defendants even constituted the type of conduct that the antitrust laws were enacted to proscribe. *Id.* at 518-22.

We will address each of these holdings in turn, considering whether or not the plaintiffs have stated a valid cause of action under the antitrust laws. In determining whether the district court acted properly in dismissing the plaintiffs' claims, we are reminded that we are bound to view their allegations in a liberal fashion: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading

roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (footnote omitted). Indeed, this court has noted repeatedly that "[a]lthough plaintiffs may be unable to allege facts proving actual acts of [an antitrust] agreement or conspiracy, the pleadings are sufficient [to withstand a motion to dismiss] if they set forth facts from which an inference of unlawful agreement can be drawn." *Brett v. First Federal Savings & Loan Association*, 461 F.2d 1155, 1158 (5th Cir. 1972).

A. The Labor Exemptions to the Antitrust Laws

The district court dismissed the plaintiffs' antitrust claims primarily on its belief that, even if the allegations were taken as true, the defendants' conduct was protected by the nonstatutory labor exemption to the antitrust laws. 511 F.Supp. at 515-19. In their brief on this appeal, the defendants rely on both the statutory and nonstatutory labor exemptions to the antitrust laws as a defense.

In *Connell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), the Supreme Court explained the two categories of organized labor's exemption from federal antitrust laws. The Court noted that the statutory exemption derives from three federal statutes: section 6 of the Clayton Act, 15 U.S.C. § 17; section 20 of the Clayton Act, 29 U.S.C. § 52; and section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104. "These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the anti-trust laws." *Connell Construction Co.*, 421 U.S. at 622, 95 S.Ct. at 1835.

The Court went on to state that a proper accommodation between the congressional policies favoring collective bargaining under federal labor statutes and favoring free competition in the business market required that certain union-employer agreements be accorded a limited *nonstatutory* exemption from the antitrust laws:

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

Id.

We cannot agree that the defendants' alleged conduct is protected by either the statutory or nonstatutory labor exemption to the antitrust laws. These exemptions are for the benefit of employees and their unions, and offer no shelter for the acts of employers, except perhaps only incidentally.

The nonstatutory labor exemption, as recognized by the Supreme Court, has only been invoked in situations where a union has made some sort of agreement with an employer that has a deleterious antitrust effect on other unions or employers. As noted earlier and emphasized again, *Connell Construction Co.* teaches that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets

requires that some *union-employer agreements* be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.* (emphasis added). This concept that the nonstatutory labor exemption applies only to union agreements with nonlabor groups was recently reiterated by the Supreme Court in *H. A. Artists & Associates, Inc. v. Actors' Equity Association*, 451 U.S. 704, 716-17 n. 19, 101 S.Ct. 2102, 2110 n. 19, 68 L.Ed.2d 558 (1981).

In the present case, the only alleged agreement or conspiracy is one between employers and the multiemployer bargaining organizations of which they are members. The antitrust claims do not allege that any of these defendants have entered into agreements with any unions; thus, the nonstatutory exemption should not come into play under these facts. *Berman Enterprises, Inc. v. Local 333, United Marine Division*, 644 F.2d 930, 935 n. 6 (2d Cir.), *cert. denied*, 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 381 (1981); *Mackey v. National Football League*, 543 F.2d 606, 613-14 & n. 12 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). The "benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States v. Women's Sportswear Manufacturers Association*, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949).

Likewise, the statutory labor exemption affords no haven for the defendants. It is well settled that the statutory exemption does not apply when a union combines with a non-labor group to restrain trade. *H. A. Artists & Associates, Inc. v. Actor's Equity Association, supra; Allen Bradley Co. v. International Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945); *United States v. Hutcheson*, 312 U.S. 219, 61

S.Ct. 463, 85 L.Ed. 788 (1941). "A fortiori, if the statutory exemption is inapplicable to business group conspiracies involving unions, the exemption cannot be read to immunize anti-competitive conduct on the part of employers acting alone." *California State Council of Carpenters v. Associated General Contractors, Inc.*, 648 F.2d 527, 534 (9th Cir. 1980), *cert. granted*, __ U.S. __, 102 S.Ct. 998, 71 L.Ed.2d 292 (1982).[22]

B. Do the Plaintiffs State a Valid Antitrust Claim?

Next we must consider whether, questions of anti-

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[22] *This is so even assuming, as the defendants argue, that this case arises out of a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C.* § 113(c), and that the employer's conduct fell squarely within the specified acts declared by the Clayton and Norris-LaGuardia Acts not to be violations of federal law. That was precisely the situation which obtained in *Allen Bradley*. 325 U.S. at 807, 65 S.Ct. at 1538. There the Supreme Court held that a union and an employer group which conspired to erect a sheltered local business market in order to exclude other businessmen from the market and charge prices above the competitive level had violated the antitrust laws, even though the conspiracy developed from a labor dispute between the union and the employer group. The Court conceded that the union's activities fell squarely within the language of the Norris-LaGuardia Act. Nevertheless, the Court stated that the purpose of the antitrust laws was to outlaw business monopolies, and that "[a] business monopoly is no less such because a union participates...." 325 U.S. at 811, 65 S.Ct. at 1540. To this we may add that it is no less such because a union does not participate.

> The plaintiffs allege, as we discuss *infra*, that defendants have conspired to restrict competition among contractors competing for construction jobs in the New Orleans area. We are skeptical of the defendants' ability to show that this conduct does indeed fall within the activities explicitly protected by the Norris-LaGuardia Act, 29 U.S.C. § 104. *See California State Council, supra*, at 534-36 & n. 12. However, we need not decide this issue, as the reasoning of *Allen Bradley* makes it clear that these anticompetitive activities are not entitled to statutory protection regardless of the language of the Act.

trust exemption aside, the plaintiffs have stated a cause of action under the antitrust laws. The plaintiffs' antitrust claims consist of allegations that the four named defendants have conspired to restrain interstate commerce and trade in violation of the Clayton and Sherman Acts:

> 10. ...
> Such acts, conspiracies and monopolies were between the named defendants and consist of:
>
> (a) To help and control and monopolize construction jobs in New Orleans and vicinity.
>
> (b) To eliminate the Plaintiff-Union from the building and construction industry in New Orleans and vicinity by entering into agreements with owners and builders, whereby such owners and builders utilize contractors who do not have agreements with the Plaintiff-Union.
> ...
>
> (i) The defendants jointly and in concert have conspired and schemed effectively to have other union contractor-members of the AGC to [*sic*] engage in a pattern and practice of creating so called "double-breasted" contractors for the purpose of evading obligations under the Craft Agreement.
>
> 11. ...
> Plaintiffs show further to the Court that defendants and each of them are guilty of the violations of the Anti-Trust laws as hereinabove set out, and that said Employers-Defendants are engaged in the construction industry and have maintained membership in various open-shop associations purportedly representing the building construction industry with the main

purpose of eliminating membership in or the use of members of the Plaintiff Unions, secure favored economic conditions and gain market domination.

12. Such associations and its [*sic*] employer members are not immune from Anti-Trust Laws since by illegally combining to agree to pay lower wages and conditions by monopolizing the New Orleans and vicinity building and construction industry, it would be restraining competition and raising prices by the restraining of competition. The defendant AGC Contractors have illegally combined and agreed to this monopoly by open-shop contractors, notably those represented by the At Large District of the AGC of Louisiana, Inc., so as themselves [*sic*] would be able to be given a share of this market from owners and builders who do not wish to do business with contractors having collective bargaining agreements with your plaintiff.

1 Rec. 5-7.

These pleadings allege a concerted refusal to deal and an attempted monopolization of a segment of construction jobs in the New Orleans area. The stated purpose of these restraints is to weaken the power of the Unions and their ability to represent employees with respect to wages and working conditions. However, in order for a restraint of trade to be actionable under the Sherman Act there must be a restraint upon commercial competition in the marketing of goods or services. *Apex Hosier Co. v. Leader*, 310 U.S. 469, 495, 60 S.Ct. 982, 993, 84 L.Ed. 1311 (1940). We have held in *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970), cert. dismissed, 404 U.S. 801, 92 S.Ct. 21, 30 L.Ed.2d 34

(1971), that *Apex* requires such a restraint whether the restraint is caused by a labor organization or an employer.

Prepmore involved a complaint by a union that an employer had conspired with an out-of-state company to injure the union and destroy its operations in Russelville, Alabama by a refusal to deal with the union concerning wage rates and working conditions. A panel of this circuit dismissed the claim of a concerted refusal to deal as not stating a claim under the Sherman Act: "There is no indication, however remote, of a conspiracy or combination on the part of Prepmore [the in-state employer] and Blue Bell [the out-of-state employer] to restrain competition in the marketing of Prepmore's goods." 431 F.2d at 1007. It is true that a concerted refusal to deal with a union may result in a restraint on competition in the marketing of labor; it may have anticompetitive effects on wages and working conditions (as does the existence of a successful union itself). However, this anticompetitive effect is not enough without more to fulfill the requirements of the Sherman Act.[23]

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[23] Similar fact patterns may be found in other major cases in which anti-union activity by employers has been found not to state a claim under the antitrust laws. In *Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133 (8th Cir. 1979), it was alleged that during a strike by members of a union against a local grocery store, the store replaced the striking employees with personnel provided by a wholesale food supplier. The Eighth Circuit dismissed a claim of a Sherman Act conspiracy, since the actions of the businesses "had no anticompetitive effect unrelated to the collective bargaining negotiations" which motivated the strike; "supplying temporary replacement workers did not have any anticompetitive effect beyond the labor relations at the [local grocery] store." 597 F.2d at 136 & n.7.

In *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75, 11 L.Ed.2d 61 (1963), it was alleged that an agreement within the railroad industry for a strike insurance plan violated the Sherman Act. The court in *Kennedy* held that, the plan did not "effect[] an unnatural and anticompetitive regulation of the

The Supreme Court's decision in *Connell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), is instructive on this point. In *Connell* it was alleged that the union attempted to picket general contractors to coerce them into hiring only subcontractors who had signed collective bargaining agreements with the union. There was no attempt to picket the general contractors because they themselves did not hire union labor. A general contractor, Connell, signed an agreement stating it would hire only signatory subcontractors and then sued to void the agreement on the grounds that it violated the Sherman Act. The Supreme Court held that a cause of action under the Sherman Act was stated "because it [the agreement] has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 635, 95 S.Ct. at 1841.

(Footnote 23 continued)
pricing, supply, or distribution of goods or services." 319 F.2d at 373 (footnote omitted). The court noted that the appellants had urged that the plan had an anticompetitive effect on the labor market, but it stated that this was not the concern of the antitrust laws. *Id.*

Finally, in *Amalgamated Clothing and Textile Workers Union v. J. P. Stevens & Co.*, 475 F.Supp. 482 (S.D.N.Y.1979), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980), the plaintiff union alleged systematic efforts by the defendant to harrass the union and its members and prevent the union from organizing its employees. Distinguishing the case from the situation posed in this circuit's decision in *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976), (discussed *infra* at note 27), the district court explained that efforts to impede the union "entirely unaccompanied or uncomplicated by any element of monopolistic effect upon competition in the marketplace for goods or services," could not state a cause of action under the antitrust laws. 475 F.Supp. at 490. The court characterized *Tugboat* as similar in nature to a series of "sham union" cases, in which an employer creates such an employee organization both to injure the union and to gain an advantage over its competitors. *Id.* at 489 n.6. In such cases, argued the court, a restraint on purely commercial competition may accompany the attempted domination of the labor market, and an antitrust claim is properly stated.

Under *Apex Hosiery*, a conspiracy by the union and employees of nonsignatory subcontractors to picket and harrass such subcontractors into becoming signatories would not state a violation of the antitrust laws; the purpose and effect of the conspiracy is merely to eliminate competition over wages and working conditions. However, in *Connell*, the union attempted to achieve a similar result through a different means. Instead of picketing the offending subcontractors, the union picketed the general contractors who hired them. The resulting union-general contractor agreement was designed to eliminate competition over wages and working conditions at the level of subcontractor employees, but it did so by cutting off contracting jobs to non-signatory subcontractors. This approach did violate the antitrust laws, for it created a restraint on competition between competing providers of subcontracting services. This was a deliberate restraint on commercial competition, even though the ultimate purpose of the restraint was to effect a restraint on what would not be considered commercial competition under the meaning of the Sherman Act.[24]

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[24] The direction of the cause and effect relationship is apparently made important by Justice Powell's language in *Connell*. When a union (or an employer for that matter) attempts to restrain competition on wages and working conditions, this will of necessity have ripple effects in the rest of the market for a particular product, since one of the factor costs of production (in this case, labor) is made subject to anticompetitive restraint. This much was recognized in *Apex Hosiery*. 310 U.S. at 503-04, 60 S.Ct. at 997-98. The natural effects of such anticompetitive restraint are acceptable as a consequence of the overriding concerns of federal labor policy. However, when the union or employer does not restrict itself to mere manipulation of the labor market *per se*, but attempts an indirect effect on that market through direct restraints on commercial competition, i.e., through monopolization of supply, control of prices, or allocation of product distribution, the antitrust laws are violated due to the means chosen, and not the end sought to be achieved. *See H. A. Artists & Associates, Inc. v. Actors' Equity Association*, 451 U.S. 704, 715 n.16, 101 S.Ct. 2102, 2109 n.16, 68 L.Ed.2d 558 (1981).

In the present case, it is clear that the major concern of the plaintiffs is the effect the defendants' alleged conspiracy will have on the ability of the unions to represent their member employees. Thus, to the extent that these pleadings allege merely a concerted refusal to deal with the unions in an attempt to restrain competition in wages and working conditions, the pleadings do not state a cause of action under the antitrust laws.

The pleadings need not be read so narrowly, however. Although most of the plaintiffs' antitrust pleadings clearly do not allege antitrust injury, and we certainly do not endorse them as examples of well pled antitrust allegations, this does not relieve us of the responsibility of considering whether *any* proper theory of relief is pled. As we have explained above, antitrust allegations in particular are to be construed liberally. Moreover, as we have stressed continually, "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)).

Closer inspection of the pleadings reveals two theories which do allege anticompetitive effects outside of the labor market *per se*. The first is that defendants have engaged in a concerted refusal to deal not with the Unions themselves, but with other contractors who hire union workers. The second involves a concerted refusal to deal with contractors who do not create "double breasted" union-non-union arrangements.

The analysis behind these two theories runs as

follows: Assume that, as pled, the goal of defendants is to weaken the position of the Unions in the New Orleans construction industry. A concerted refusal among all contractors to deal with the Unions would accomplish this result, and would not, under *Prepmore*, state a cause of action under the Sherman Act. However, where some of the contractors are already hiring union members, another strategy might be invoked; this would be to try to drive those signatory contractors out of business or convince them to mend their ways in the future.

The plaintiffs' allegations in section 10(b) of their pleadings state one way in which this can be done: an agreement between builders in the area and non-signatory contractors that the builders will give work only to contractors who hire only non-union labor. Such an agreement intends a clear anticompetitive effect in the area of commercial competition; i.e., competition between building contractors for their services. Contractors who use union labor are put at a disadvantage because their source of supply of available construction jobs is narrowed or eliminated. Some of these contractors may be more efficient than nonsignatory contractors either because their factor costs are cheaper or because the union labor is more productive per man-hour. In any case the agreement would act as a barrier to entry by conceivably more efficient firms who seek to utilize union labor.[25]

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[25] A very similar situation was presented in *California State Council of Carpenters v. Associated General Contractors, Inc., supra.* In that case it was alleged that the defendant contractor association had conspired to coerce owners of property, general contractors, and "other letters of construction contracts," with whom the unions had no collective bargaining relationship, to hire only non-signatory construction firms (primarily subcontractors). 648 F.2d at 531. Describing this set of facts as the "obverse" of *Connell, id.* at 532, the majority opinion held that an anticompetitive restraint was alleged at the level of subcon-

The concerted activity complained of may be the result of a direct agreement between non-signatory contractors and builders to force signatory contractors out of business; on the other hand, it may consist of an agreement between only non-signatory contractors to use their share of the market to coerce the builders into the same. *See California State Council of Carpenters, supra*, at 531. The plaintiffs' pleadings allege both possibilities. Moreover, the pleadings allege a concerted refusal to deal both in the context of forcing out signatory contractors or coercing them to adopt the same sort of "double breasted" arrangement complained of in this case. The crux of all these different variations of the basic theory is that pressure is

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(Footnote 25 continued)
tractor services which stated a claim under the Sherman Act. In this respect *California State Council* may be distinguished from *Prepmore* and other cases discussed *supra*.

In *Carpenters Local Union No. 1846 v. E. I. Du Pont de Nemours & Co.*, 110 L.R.R.M. 3140 (E.D.La.1981), it was alleged that defendant Du Pont had solicited bids for the employment of contractors and craftsmen and had invited only defendant bidders who were non-union counterparts in "double breasted" construction businesses; an agreement was alleged between defendants to monopolize construction jobs in Louisiana by restricting available jobs only to non-union bidders. The district court declined to dismiss the complaint for failure to state a claim, since plaintiffs had alleged, albeit imprecisely, restraints upon competition in the bidding for contracting services. The court relied heavily on both *California State Council of Carpenters* and *East Central Ohio Building & Construction Trades Council v. Landmark, Inc.*, No. C76-371A (N.D.Ohio, April 26, 1977) (unpublished opinion). *Landmark* involved a suit by plaintiff unions against an association of builders and contractors, various construction companies, and Landmark, a feed corporation engaged in the feed and grain business. Landmark awarded a contract to a construction company with the provision that hiring for the construction project be done on a "merit shop" or non-union basis. Plaintiffs alleged that the builders' association assisted in the negotiation and implementation of the contract in a conspiracy to gain a competitive advantage in the building industry for non-union contractors. The plaintiffs' complaint was held to state a cause of action despite the fact that the purpose of the defendants' acts was to weaken the union and a concerted refusal to deal with the union itself was also alleged.

being applied not on the Unions directly, but indirectly by means of direct anticompetitive action against the signatory employers of union members.

Such allegations, if true, do involve an anti-competitive restraint in the area of competition for services of contractors. It may be objected that although this is the effect of the alleged agreements, the real purpose of the agreement is to get at the Unions. The non-signatory contractors are merely stepping over the corpses of the signatory contractors on their way to domination of the labor market; such domination is not within the ambit of the antitrust laws under *Prepmore* and *Apex Hosiery*, and so no claim exists under the Sherman Act.

However, precisely this sort of argument was rejected in *Connell*. As we described above, the union was not protected in that case although its ultimate purpose was domination of the labor market, which was legal. The method by which it achieved that end was the creation of a direct anticompetitive restraint on the market for subcontracting services. It was the means, and not the ultimate end, which subjected it to antitrust liability. Although a restraint at the level of the labor market itself does not state a claim of violation of the antitrust laws, a restraint at the level of subcontractor or contractor services does state such a claim.[26] Thus plaintiffs' antitrust claims must

[26] Judge Sneed's dissent in *California State Council of Carpenters*, *supra*, argued that the "economic realities of employer-employee relations" are that "[e]mployers without collective bargaining agreements with the plaintiffs may make more profit than those who have such agreements. Their absence from this lawsuit constitutes some evidence of their evaluation of their 'injury.' " 648 F.2d at 542. But plaintiffs having alleged an anticompetitive effect in the industry, it is not proper for an appellate court to deny plaintiffs an opportunity to prove such an effect by taking judicial notice of whether signatory or non-signatory

survive a dismissal under Rule 12(b)(6) to the extent that they allege anticompetitive restraints at the contractor services level.

C. Standing Issues on Remand

Although we have held that a cause of action exists under the antitrust laws because of restraints at the level of contractor services, we wish to clarify our analysis further by explicitly separating our views on the existence of a cause of action from the question of standing. None of the defendants has challenged the standing of any of the plaintiffs to bring an antitrust action, but instead all have focused on the existence of a cause of action. Our analysis has established that *Connell* seems to allow a cause of action against the defendants. However, that analysis does not necessarily point to the Unions or the Funds as the natural plaintiffs who are entitled to bring that cause of action. Rather, the most obvious candidates for standing are those most directly injured at the contractor services level: the signatory contractors themselves.

Judge Sneed's dissent in *California State Council of Carpenters, supra*, quite rightly focuses on this very problem. Interestingly enough, he concedes that a reading of the complaint in that case as an allegation of restraints against signatory contractors may constitute a *bona fide* antitrust claim. That is in fact what we have held today. But the real problem with this theory, he insists, is not lack

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(Footnote 26 continued)
firms presently in the industry are more efficient. Nor does Judge Sneed's argument speak to the question of barriers to entry of new firms not yet in the industry. Moreover, to the extent that the plaintiffs allege *per se* violations of the antitrust laws, the present efficiency of extant firms in the industry is simply irrelevant.

of antitrust injury but lack of standing:

> The majority also construes the complaint to allege a boycott of employers which have collective bargaining relationships with the plaintiffs. Here a significant injury to the employers is properly alleged. But this construction of the complaint raises a standing problem. As the majority point out, "In this circuit, legal causation has traditionally been judged under the so-called 'target area test.' " P.537. Under the two-step analysis required by this test, the employers which are directly harmed by the alleged boycott have standing to sue under the Sherman Act. According to the majority so also do the plaintiffs. Under the "target area test," as employed by the majority, both have standing. This is an anomalous result. Instantly it raises the possibility of standing for antitrust purposes of employees, whether unionized or not, whose employer is injured in *his* business by an unlawful conspiracy.

648 F.2d at 543.

Judge Sneed's point is well taken. Although our understanding of the rationale behind *Connell* leads us ineluctably to the conclusion that a cause of action exists, we are in agreement that the issues regarding standing are conceptually distinct. As the standing issue has been neither addressed nor briefed by either of the parties, we think it wise simply to direct it to the district court's attention on remand, so that the court can determine which of the Unions or Funds are proper parties to this case after full development of the factual and legal issues by the parties. *Cf. Martin v. Morgan Drive Away*, 665 F.2d 598, 606-07 (5th Cir. 1982) (remand to address standing issues

after development of record); *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002, 1012 (5th Cir. 1979) (dismissal for lack of subject matter jurisdiction "should be granted sparingly," and only after complete development of jurisdictional facts should a district court dismiss an antitrust case).[27]

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[27] In particular we direct the district court to consider the effect of our decision in *Tugboat Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976), and the Supreme Court's most recent pronouncement in the area, *Blue Shield v. McReady*, __ U.S. __, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). *Tugboat* held that a union (Seafarers) had standing to sue under allegations that Tugboat, Inc., and a company union, Masters, Mates, and Pilots (MMP) had conspired to prevent Seafarers from organizing employees at Tugboat's job site. Seafarers already represented employees at Tugboat's competitor, Mobile Towing. Seafarers charged that the conspirators hoped to drive Mobile Towing out of business because labor costs for Tugboat would be lower due to the company union. This circuit held that the employees represented by Seafarers as well as the union itself had standing to sue under § 4 "not because they suffered injuries as a result of their employer being victimized by violations of the antitrust laws, but because the conspiracy in this case was aimed at the employees as much as it was aimed at the employer." 534 F.2d at 1177 (footnote omitted). The court found it significant that it was alleged that "Tugboat ... conspired with Masters, Mates, and Pilots to keep plaintiff union employees off of Tugboat, Inc., job sites, necessarily depriving the union member plaintiffs of job opportunities." *Id.* at 1177-78. In so holding, the court specifically refused to endorse the broad holding of the Third Circuit in *Int'l Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, Inc.*, 483 F.2d 384 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974), that union members possessed antitrust standing on the basis that they were employees of the contractors *against whom* the conspiracy was aimed. 534 F.2d at 1177.

In *McReady*, an employee covered by a prepaid group health plan which reimbursed psychiatrist but not psychologist services brought a Sherman Act § claim charging that Blue Shield and an association of psychiatrists had conspired through this policy to injure psychologists in the market for psychotherapy services. The plaintiff, McReady, had been treated by a psychologist and claimed economic injury to her business or property due to the policy of non-reimbursement. The Supreme Court held that she possessed standing under § 4 of the Clayton Act to bring a treble damage action.

Although we express no opinion on the standing issues, leaving

VI. SUMMARY OF OUR DISPOSITION OF THIS CASE.

We hold that:

A. The dismissal of the section 301 claims against defendants AGC-New Orleans and AGC-At Large is AFFIRMED.

B. The dismissal of

(1) the section 301 and ERISA claims against Halmar,

(2) the section 301 and ERISA claims against Farnsworth, and

(3) the antitrust claims against all defendants is REVERSED,

and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

(Footnote 27 continued)
these to the district court in the first instance after the development of a factual record, we think these decisions may help focus its analysis. It may also be helpful for the district court to distinguish the standing of the Unions from that of the Funds, as well as the standing of each type of plaintiff to seek equitable relief from its standing to seek the damages called for in the plaintiffs' complaint.

Footnote 11 corrected by the Fifth Circuit Court of Appeals

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* Corrected Footnote 11

It appears, however, that the Funds would not have standing to seek unit clarification, although the Unions might. 29 U.S.C. §§ 159(c), 152(2); 29 C.F.R. §§ 102.60(b), 102.1 (1981). The Supreme Court has stated that the doctrine of primary jurisdiction has no application where the plaintiffs could not invoke administrative action. *Rosado v. Wyman*, 397 U.S. 397, 406 (1970). *Rosado*, however, did not present a case where some plaintiffs had standing before the agency and others did not, a situation which raises competing concerns of judicial and administrative economy and potential collusion to prevent invocation of primary jurisdiction.

The picture is further complicated by the defendants' allegations that the contract at issue here is a prehire contract and that the Unions have failed to demonstrate the majority status in the relevant bargaining unit required to make such a contract fully enforceable. *See* part II.C.7, *infra*. These allegations bear on the primary jurisdiction issue because unit clarification is available only where "there is a certified or currently recognized representative of a bargaining unit and there is no question concerning representation...." 29 C.F.R. § 101.17 (1981). The majority status issue is a question concerning representation. If the district court determines at an early stage of the litigation that this is a prehire contract, it must then add into the primary jurisdiction calculus the fact that the unit clarification procedure would be unavailable to any of the plaintiffs. If the district court also concludes that it would be undesirable to require the plaintiffs to file unfair labor practice charges, then *Rosado*, *supra*, would be brought directly into play because the plaintiffs would have no way to invoke Board action.

Finally, in the event the district court does require prior resort to the NLRB, we note that the court must decide not only which issues should be submitted to the Board, but also whether to dismiss the case or merely stay it. If the court reaches that point, we direct its attention to 3 K. Davis, Administrative Law Treatise § 19.07 (1958, Supp. 1970 & Supp. 1976) and the cases cited therein, particularly *United States v. Michigan Nat'l Corp.*, 419 U.S. 1 (1974).

82-NO. 414

In the Supreme Court of the United States

OCTOBER TERM, 1982

PRATT-FARNSWORTH, INC., HALMAR, INC., NEW ORLEANS DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LA., INC., AT-LARGE DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LA., INC.,

Petitioner,

v.

CARPENTERS LOCAL UNION NO. 1846 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT VOLUME III—APPENDIX "B", "C", "D", "E"

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APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3222

CARPENTERS LOCAL UNION NO. 1846 of the UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO, ET AL.,

Plaintiffs-Appellants,

versus

PRATT-FARNSWORTH, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 4, 1982, 5 Cir., 1982, __F.2d__).

(January 5, 1983)

Before WISDOM, RANDALL and TATE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "C"

CARPENTERS LOCAL UNION NO. 1846 of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Carpenters District Council of New Orleans and Vicinity Pension Trust, Carpenters District Council of New Orleans and Vicinity Health and Welfare Plan, Carpenters District Council of New Orleans and Vicinity Apprenticeship Educational and Training Program, William John Fortney; Kenneth J. Perkins; Donald C. Haynes; Rayford H. Colamari; Lothard J. Broussard, Sr.; Franklin B. Hunter; Elaire Dauzat; Dennis J. Savoy; Lawrence J. Rousselle; Desire Bergeron; Vernon D. Harvey; and William J. Brignac, Jr. (Hereinafter Class I), James E. Crawford; Lawless J. Martin; Robert Brown; Charles Mitchell; Nathaniel E. Williams; Johnnie Williams; Fred Scott and Lee R. Miskell (Hereinafter Class II); and James E. Crawford; Lawless J. Martin; Robert Brown; Nathaniel E. Williams and Lee R. Miskell (Hereinafter Class III)

v.

PRATT-FARNSWORTH, INC.; Halmar, Inc.; New Orleans District, Associated General Contractors of Louisiana, Inc.; At Large District, Associated General Contractors of Louisiana, Inc.

Civ. A. No. 80-1570

United States District Court
E. D. Louisiana

April 2, 1981.

Union brought action against contractors and contractors' associations alleging violations of Labor Management Relations Act, of Employee Retirement Income

Security Act and of antitrust statutes. On defendants' motion to dismiss complaint, the District Court, Jack M. Gordon, J., held that: (1) absence of contractual relationship between first contractors' association, second contractors' association and union district counsel entitled the associations to dismissal of union's claim under Labor-Management Relations Act; (2) authority to determine appropriate "bargaining unit" was reserved to National Labor Relations Board, and thus district court was precluded from determining that affiliation between contractors warranted characterization as "single employer" for purposes of determining jurisdiction of district court over claim under Labor Management Relations Act; (3) union was required to exhaust contractually mandated grievance procedures prior to initiating action under Labor Management Relations Act; (4) absent contractual obligation under collective bargaining agreement, contractor, first contractors' association and second contractors' association had no obligation, under Employees' Retirement Income Security Act, to contribute to union trust fund; (5) union was required to exhaust contractual remedies under collective bargaining agreement prior to initiating judicial action for failure to make contributions to union trust funds allegedly required by Employee Retirement Income Security Act; and (6) labor exemption to antitrust laws precluded imposition of liability on contractors and on contractors' associations on basis of union's claims that they conspired to restrain competition and to monopolize construction industry with purpose of circumventing collective bargaining agreement.

Motion granted.

Jerry L. Gardner, Jr., Barker, Boudreaux, Lamy, Gardner & Foley, New Orleans, La., for plaintiffs.

Frederick A. Kullman, Kullman, Lang, Inman & Bee, James Burton, Brian, Simon, Peragine, Smith & Redfearn, New Orleans, La., for defendants.

MEMORANDUM AND ORDER

JACK M. GORDON, District Judge.

Defendants, Pratt-Farnsworth, Inc.; Halmar, Inc.; Associated General Contractors of Louisiana, Inc., New Orleans District; and Associated General Contractors of Louisiana, Inc., At Large District, have moved the Court for dismissal of and, alternatively, for summary judgment in plaintiffs' suit styled as a class action. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiffs brought this action on behalf of all members of and all persons seeking employment through Carpenters Local Union No. 1846 and Pile Drivers Local Union No. 2436 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Additional represented plaintiffs include all affiliated participants and beneficiaries of the Carpenters District Council of New Orleans and Vicinity's Pension Fund, Health and Welfare Plan, and Apprenticeship Educational and Training Program. Also joined are the plaintiffs named of Class I, Class II, and Class III. Heretofore, the Court has not considered the merits of the class certification issue. Oral argument was heard on September 24, 1980, after which the Court took the matter under submission. Having reviewed the arguments, the memoranda of counsel, and the applicable law, the Court has decided to GRANT defendants' motion to dismiss.

The instant action evolved from the Carpenters District Council's bargaining relationship with the Associated General Contractors, Inc., New Orleans District

(hereinaftear *AGC, New Orleans*), and the Associated General Contractors of Louisiana, Inc., At Large District (hereinafter *AGC, At Large*). Defendants Pratt-Farnsworth, Inc. (hereinafter *Farnsworth*) and Halmar, Inc., (hereinafter *Halmar*), employers engaged in the building and construction industry, affiliated themselves with the AGC organizations, thereby authorizing AGC to bargain in their behalf with the Carpenters District Council over wages, terms, and conditions of employment. Accordingly, *AGC, New Orleans* negotiated the collective bargaining agreement extending from May 1, 1977 to April 30, 1980 with the Carpenters District Council—such agreement constitutes the controverted subject matter of this suit.

The gravamen of plaintiffs' complaint is that defendants have conspired to restrain competition and to monopolize the construction industry in New Orleans and vicinity. Allegedly, *Farnsworth* established *Halmar* to create a union-free environment with the purpose of circumventing the "Craft Agreement," the collective bargaining agreement with plaintiff union. Plaintiffs further claim that the district organizations of the defendant AGC have participated in this monopoly through utilization of those "open-shop" contractors represented by the *AGC, At Large*.

In pursuance of their complaints, plaintiffs have filed this action, stating causes of action under three different sets of federal statutes; namely, (i) Section 301 of the Labor Management Relations Act, as amended 29 U.S.C. § 185(a); (ii) The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 (hereinafter ERISA); and (iii) the Clayton and Sherman Antitrust Acts, 15 U.S.C. §§ 1-7, 12-27 and 28 U.S.C. § 1332 et seq. Let us consider each of

these in turn.

I.

The Section 301 Allegations

The Labor Management Relations Act, Section 301 (a) establishes federal court jurisdiction for collective bargaining agreement violations.

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a)

Thus, suits maintainable under Section 301 must be based upon a collective bargaining agreement existing "between an employer and a labor organization...."

A. The Section 301 Allegations as applied to the AGC organizations.

The Associated General Contractors of Louisiana, Inc. acts through its Collective Bargaining Committee as the bargaining agent for certain Association members. Solely those parties which signify their intention to accept the agreement's terms are contractually bound. The agreements, then, are neither negotiated for nor binding upon any other Association member, nor upon the Association itself. This is evidenced by the terms of the Collective Bargaining Agreement, *Article I*—

PARTIES AND DEFINITIONS:

Section I. The parties to this Agreement are the following:

(a) *Those members* of the New Orleans District, Associated General Contractors of Louisiana, Inc. *signatory hereto* and listed in Appendix "A", together with such other members of said District who may hereafter become signatory hereto, hereinafter referred to as "Contractors" or "Employers" collectively, and as "Contractors" or "Employer" individually.

(b) *Those Unions signatory hereto* and listed in Appendix "B", hereinafter referred to as "Unions" collectively, and as "Union" individuall. [emphasis added]

The *AGC, New Orleans* and the *AGC, At Large* are not signatories to the agreement. Rather, it is those members of the *AGC, New Orleans* that are contractually bound.

The absence of such contractual relationship between *AGC, New Orleans* or *AGC, At Large* and Carpenters District Council mandates dismissal as to them of the Section 301 claim under settled authority in this jurisdiction. In ***Dixie Machine Welding & Medtal Works, Inc. v. Marine Engineers Beneficial Association***, 243 F.Supp. 489 (E.D. La.1965), the plaintiff brought suit in state court to enjoin defendant's picketing. The defendant-union sought removal to the federal court on the basis that it was a Section 301 action. The Court said:

> Defendant-union argues that this suit is based in part on the alleged breach of a collective bargaining agreement between the plaintiff-

> employer and various labor organizations and for that reason arises under Section 301. This contention is erroneous, however, because there is no collective bargaining agreement between the parties to this suit.... While it is alleged by plaintiff that the activity of its employees (resulting from their refusal to cross the picket line of Defendant) is being carried on in violation of the collective bargaining agreements between plaintiff and its employees, this suit is not against plaintiff's employees but against Marine Engineers Beneficial Association with which Plaintiff has no agreement of any kind. Between the *parties* to this action, therefore, there is no collective bargaining agreement and this is not a "suit for violation of contracts between an employer and a labor organization" or between labor organizations which Section 301 of the Labor Management Relations Act would confer jurisdiction in this court. 243 F.Supp. at 491. [emphasis in the original]

See also *United Steel Workers of America, AFL-CIO v. Rome Industries, INc. d/b/a Rome Plow Company*, 437 F.2d 881 (5th Cir. 1970).

B. *The Section 301 Allegations as applied to Farnsworth and Halmar*

While *Halmar* is not a signatory to the contract, plaintiffs have argued that the affiliation between *Farnsworth* and *Halmar* should result in their characterization as a "single employer." This classification, plaintiffs contend, would impose the terms of the bargaining agreement upon *Halmar*.

The Court cannot agree with plaintiffs' contention

because adoption of that position inevitably would result in this Court's usurpation of power to determine the appropriate "bargaining unit" reserved to the National Labor Relations Board. Section 9(b) of the National Labor Relations Act provides the following directive.

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof .... 29 U.S.C. § 159(b)

South Prairie Construction Company v. Operating Engineers, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (commonly known as the *Peter Kiewit* case) presents a parallel situation. The union there filed a complaint with the N.L.R.B. alleging that South Prairie and Kiewit's refusal to apply the bargaining agreement effective between the Union and Kiewit to South Prairie's employees constituted a violation of the National Labor Relations Act § 8(a)(5) and (1), as amended 29 U.S.C. § 158(a)(5) and (1). The Court of Appeals for the District of Columbia Circuit had classified South Prairie and Kiewit as a "single employer," finding them guilty of an unfair labor practice since their combined employees comprised an appropriate bargaining unit. See *Local No. 627, Int. U. of Operating Eng. v. N.L.R.B.*, 518 F.2d 1040 (D.C.Cir.1975).

While not disturbing the Circuit Court's decision regarding the "single employer" status, the Supreme Court held that this finding would not be dispositive in a determination of the appropriate bargaining unit under controlling N.L.R.B. cases.

> The Board's cases hold that especially in the construction industry a determination that two affiliated firms constitute a single employer 'does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit.' 425 U.S. at 803, 96 S.Ct. at 1843. (citations omitted)

Thus, the Supreme Court concluded that the Court of Appeals had invaded the statutory province of the N.L.R.B. by deciding the § 9 "unit" question in the first instance. The Court restated that the "selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed....' " citing *Packard Motor Co. v. N.L.R.B.*, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947). Furthermore, by foreclosing the Board from determining the § 9 appropriate bargaining unit, the Court of Appeals did not give " 'due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the Courts under Article III of the Constitution.' " *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

The Court of Appeals for the Fifth Circuit has consistently recognized the Labor Board's authority in bargaining unit selection. In *North American Soccer League v. N.L.R.B.*, 613 F.2d 1379 (5th Cir. 1980) the Fifth Circuit recognized that an employer's assumption of sufficient control over its franchisees' or members' employees could result in a joint bargaining requirement. It recognized, however, that the N.L.R.B. would impose this requirement in exercising its power to decide in each case whether

the employee unit requested is an appropriate unit for bargaining.

In a bargaining order enforcement proceeding, the Fifth Circuit prefaced its merit determination by stating that "[T]he N.L.R.B. has statutory authority to determine bargaining units." 29 U.S.C. § 159(b). *N.L.R.B. v. J. C. Penney Co., Inc.*, 559 F.2d 373 (5th Cir. 1977). The court reiterated its judicial review standards as: arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support. *Packard Motor Car Co. v. N.L.R.B., supra; N.L.R.B. v. Alterman Transport Lines, Inc.*, 465 F.2d 950 (5th Cir. 1972). An employer must establish the designated unit as clearly inappropriate before setting aside a Board's certified unit. "A showing that some other unit would be appropriate is insufficient, for a choice among appropriate units is *within the discretion* of the Board." *N.L.R.B. v. Fidelity Maintenance & Construction Co.*, 424 F.2d 707 (5th Cir. 1970). (emphasis supplied)

This Court thus concludes that adoption of plaintiffs' assertion that *Farnsworth* and *Halmar* are a single employer so as to make the instant labor contract binding upon *Halmar* necessarily would require a determination of the appropriate bargaining unit, and that such determination would be an invasion of the exclusive province of the N.L.R.B. not distinguishable from that condemned by the Supreme Court in the *Peter Kiewit* case. Hence, the motions to dismiss the Section 301 claims brought by *Farnsworth* and *Halmar* must be granted.

C. *The Section 301 claims additionally fall for failure to exhaust the contractually mandated grievance procedure.*

Article XXIII Disputes and Grievance Procedure of the collective bargaining agreement in question provides for dispute resolution pertaining to alleged violations—to be culminated in "final and binding" arbitration. Heretofore, no party has filed any illegal practice charges.

An employee who had not resorted to the agreement's grievance method was precluded from instituting a state court suit for severance pay recovery in *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). The Supreme Court discussed the interests and policies supporting contractual grievance procedure utilization. As the general rule in cases to which federal law applies, the court stated the federal labor law requirement that employees asserting contract grievances must *attempt* use of the agreed-upon contract grievance procedure as the mode of redress. The court found that side-stepping grievance means in favor of a lawsuit would deprive the parties "of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." Allowance of a procedure's non-exclusivity would thus result in loss of its desirability as a settlement method. Such a situation " 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' " 379 U.S. at 653, 85 S.Ct. at 616, citing *Local 174, Teamsters etc. v. Lucas-Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962).

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) followed *Republic Steel Corporation v. Maddox, supra*, in enunciating that an employee is bound by the collective bargaining agreement's terms governing the enforcement of contractual rights. This rule has been followed in cases of the Court of Appeals for the Fifth Circuit and the Eastern District of

Louisiana. *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 518 (5th Cir. 1978); *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167 (5th Cir. 1971). In *Rivera v. NMU Pension and Welfare and Vacation Plan, New Orleans, Louisiana*, 288 F.Supp. 874 (E.D.La.1968), the court dealt with a Section 301 suit brought by an employee seeking relief from her allegedly unlawful discharge. The court held:

> The claim is based upon, and arises out of, the collective bargaining agreement. Consequently, when, as here, that contract contains provisions governing the manner in which contractual rights may be enforced, the employee is bound by those terms and cannot bypass the exclusive grievance procedures to air his claim in court. 288 F.Supp. at 877.

The prerequisite of exhausting contractual remedies prior to initiatig a Section 301 suit applies equally to the plaintiff-union as to the plaintiff-individuals. *Pittsburgh Die Sinkers Lodge No. 50 v. Pittsburgh Forgings Company*, 255 F.Supp. 142 (W.D.Pa.1966); *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 404 F.Supp. 1067 (N.D.Cal.1975); *National Post Office Mail Handlers v. U.S. Postal Service*, 594 F.2d 988 (4th Cir. 1979).

II.

The ERISA Allegations

Any contribution obligation to the various plaintiff trust funds resulting in ERISA liability must be founded upon some collectively bargained duty to make payments thereto. Paragraph 16 of the Complaint states:

> By virtue of provisions contained in the collective bargaining agreements which defendants are bound by, defendants did promise and become obligated to make contributions, in amounts set forth below, to said Funds on behalf of its employees for each hour or portion thereof worked or for which wages were received by such employees, and class plaintiffs, from May 1, 1971, through the present, and continuing during the pendency of this litigation.

As indicated, *supra*, defendants, *AGC, New Orleans* and *AGC, At Large* are not signatories to any collective bargaining agreement with the plaintiff-union. Without being contractually bound, these defendants have no obligation to contribute to the Plaintiff Trust Funds. Thus, plaintiffs' ERISA cause of action fails against the AGC organizations.

While defendant *Farnsworth* must comply with the agreement's terms by virtue of its participatory capacity, defendant *Halmar* is under no similar obligation. Without having signed the contract, *Halmar's* liability for payments thereunder could only be based upon its relationship to *Farnsworth*. Correspondingly, as there is no allegation that *Farnsworth* has failed to make the proper payments regarding payroll employees, its only ERISA liability would stem from some payment obligation on behalf of Halmar's employees.

The Court's analysis of the Section 301 allegations is equally applicable in the ERISA context. Accordingly, the alleged ERISA liability could only arise if *Farnsworth* and *Halmar* are not only a "single employer" but, in addition, constitute a single bargaining unit. As this status decision is relegated to the N.L.R.B., plaintiffs cannot have it decid-

ed by the Court in the first instance.

Claims under the ERISA statute have been likened to those under the Labor Management Relations Act in that both require an attempt to exhaust exclusive contractual internal remedies in settlement disputes before resort to federal court. *Lucas v. Warner & Swasey Co.*, 475 F.Supp. 1071 (E.D.Pa.1979), citing *Taylor v. Bakery & Confectionary Union and Industrial International Welfare Fund*, 455 F.Supp. 816 (E.D.N.C.1978); *Fox v. Merrill Lynch & Co., Inc.*, 453 F.Supp. 561 (S.D.N.Y.1978), distinguishing *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F.Supp. 271 (E.D.Pa.1977); *Hammil v. Hoover Ball & Bearing Co.*, 85 L.R.R.M. 2231 (E.D.Pa. 1973).

In *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980), the court reviewed the ERISA text, and its legislative history, and concluded that Congress intended to grant the judiciary authority to apply the exhaustion doctrine in ERISA suits. The court further found that sound policy required such application. Since there has been no attempt at exhaustion in this case, the ERISA allegations should be dismissed as to all named defendants.

III.

The Antitrust Allegations

Defendants contend that the antitrust allegations must fall because of the non-statutory exemption of certain union-employer agreements from the antitrust laws. These contentions must be considered in light of policies implicit in achieving a delicate balance between antitrust regulation and labor law. The benefits of an exemption based on

on the national policy favoring collective bargaining have been held to extend both to "labor" and to "non-labor" parties to such an agreement. *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976) (citations omitted).

The court in *Consolidated Express Inc. v. New York Shipping, Inc.*, 452 F.Supp. 1024 (D.N.J.1978) noted the inherent tension between national policies regulating competition and those regulating labor relations.

> It is commonplace that the antitrust laws and the labor laws are antithetical. The antitrust laws are designed to promote competition; the unions are in the business of limiting it. It has fallen largely to the courts to work out a proper conciliation of these competing desiderata. 452 F.Supp. at 1036.

Thus, it has been said that such a basic tension mandates exemption from antitrust sanctions; it is appropriately granted where the policy favoring collective bargaining is so vital under the circumstances as to outweigh the interests served by free competition. Von Kalinowski, 7 *Antitrust Laws and Trade Regulation* § 48.01 (1980). Review of the accommodation process functioning yielded the following remarks:

> With varying results, courts have struggled over issues such as the merits of exempting unions from antitrust regulation, the proper extent of this labor exemption, and the degree of scrutiny to be given collective bargaining agreements. In cases involving significant labor considerations and slight antitrust implications courts have found paramount the national policies favoring collective bargaining and have granted immmunity or applied a labor exemption. Conversely, in

> cases involving significant market restraints and only tangentially affecting labor interests courts have applied the antitrust laws. Because no case has arisen with major labor *and* antitrust implications, the proper relationship between the fundamental national policies reflected in these laws never has been defined. (footnote omitted). Rober & Powers, *Defining the Relationship Between Antitrust Law: Professional Sports and the Current Legal Background*, 19 Wm. & Mary L.Rev. 395, 395916 (1978).

In the instant case, the plaintiff unions and class members are complaining of collective bargaining obstruction and consequent injury to union functions and representation. This controversy can only be characterized as a labor dispute initiated by construction industry employees against their employers and the employer associations. Accordingly, the antitrust laws do not provide a vehicle for challenging the practices under attack in this suit.

This Court has considered the antitrust allegations in this case in light of, *inter alia*, *Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Company, Inc.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) wherein an antitrust exemption was granted. In *Jewel Tea*, the unions had obtained a marketing-hours agreement from one group of employers. Upon duress of a strike vote placed upon Jewel, and notwithstanding its reluctance, Jewel entered into the contract that had previously been approved by the industry. Jewel then brought a lawsuit complaining of the union's action in forcing it to accept the agreement. This created a situation, the Supreme Court found, in which the agreement resulted not from the bargaining activities be-

tween the unions and an employer group but pursuant to the union's own labor interests. As the plaintiffs here are contesting *Halmar's* nonparticipation in collective bargaining and urging that the terms that are binding upon *Farnsworth* be imposed upon *Halmar*, their demands are similar to those made in *Jewel Tea*.

The Supreme Court in *Jewel Tea* was not called upon to adjudicate the merit of a substantive antitrust law violation. Rather, as presently before this Court, the issue to be decided was whether the collective bargaining agreement was exempt from attack because of the labor exemption from the antitrust law. After weighing the pertinent interests, the Supreme Court held that the expression of the national labor policy found in the National Labor Relations Act placed union-employer agreements beyond the Sherman Act's reach.

This Court follows *Jewel Tea* and finds that the controverted Craft Agreement is exempt from the Sherman Act. Employment terms and conditions are properly the subject of the law regulating collective bargaining—the National Labor Relations Act. Consequently, the labor dispute resulting from *Farnsworth's* alleged circumvention of the agreement is outside antitrust parameters.

Mindful of judicial limitations, in light of the propensity and temptations that contribute to overly-litigious tendencies, this Court heeds the warning that "[j]udges should not, under cover of the Sherman Act umbrella, substitute their economic and social policies for free collective bargaining." *United Mine Workers of America v. Pennington, Jewel Tea*, 381 U.S. 676, 727, 85 S.Ct. 1607, 1623, 14 L.Ed.2d 640 (dissenting and concurring opinion). For it is without this Court's province to determine who should

or who should not be a party to a collective bargaining agreement. Assuming, *arguendo*, the Court were called upon to make such a determination, the antitrust remedies would provide no guidance in adjudicating the parties necessary to effective employer-union bargaining negotiations.

Moreover, this matter, at its first instance, is delegated to the National Labor Relations Board. A contrary result would amount to precedent-setting usurpation of the Labor Board's primary jurisdiction.[1] Consistency with the Congressional policy enunciated in the National Labor Relations Act towards peaceful settlement of labor disputes [29 U.S.C. § 151 (1970)][2] demands that a com-

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[1] In *Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418, rehearing denied, 423 U.S. 884, 96 S.Ct. 156, 46 L.Ed.2d 114 (1975), and in *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965), the Supreme Court circumvented the doctrine of primary jurisdiction by finding that "federal court may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." Owing to its characterization of this matter as a labor dispute, this court will not follow such a circuitous route of assuming jurisdiction.

[2] That section, entitled "Findings and Policies" provides, in pertinent part:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such mmaterials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods

plaining party file a NLRB complaint alleging an unfair labor dispute rather than institute an antitrust suit. "[A]ntitrust doctrines throw scant light on the best means of resolving the conflicts of interest among employers, employees and labor unions." Moreover, judicial decisions in antitrust suits "contain intrinsic limitations making them unsuited" to the formulation of a consistent national labor policy. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U.Pa.L.Rev. 252, 261 (1955).

The Supreme Court offers additional authority in *Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418, rehearing denied, 423 U.S. 884, 96 S.Ct. 156, 46 L.Ed.2d 114 (1975). This decision, although the case serving as the area's touchstone, has often been criticized.[3]

(Footnote 2 continued)

flowing from or into the channels of commerce.

* * * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[3] The *Connell* decision prompted abundant commentary. Included in such discourse are the following statements.

"The most controversial case of the 1974 Term was *Connell Construction Co. v. Plumbers Local 100*, a 5-4 decision in which the court found a novel and puzzling way for depriving labor unions of their general exemption from the antitrust laws." Bartosic, *The Supreme Court 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 Va.L.R. 533 (1976).

Indeed, *Connell* "is important not only for its definition of the nonstatutory exemption but also because of the confusion the Court created in applying the exemption." Von Kalinowski, § 48.03[2].

In *Connell, supra*, a union, Local 100, pressured the Connell Construction Company to sign an agreement promising to hire only subcontractors who had collective bargaining agreements with Local 100. The agreement was not a collective bargaining agreement, nor did the union seek to represent Connell's employees. The agreement effectively prohibited Connell from hiring subcontractors who offered lower prices even when the subcontractors' employees had wages and working conditions equivalent to Local 100 members. As a result, subcontractors who offered lower prices through more efficient operations were eliminated from competition. The court found that the nonstatutory labor exemption was not directed towards this elimination which constituted a direct restraint on the business market. The court recognized operation of the principles germane to the situation.

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law

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(Footnote 3 continued)

"By distinguishing between the statutory and nonstatutory exemptions for labor union activity, the majority does remove some of the confusion surrounding the determination of labor's antitrust exemption; yet the court supplied no specific criteria for the nonstatutory balancing test beyond a vague weighing of competing goals." Paulsen, *Labor's Exemption from Federal Antitrust Law: The Diminishing Protection for Union Activity*, 28 U. of Fla.L.R. 620 (1975).

> never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore had acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.... Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, ... the nonstatutory exemption offers no similar protection when a union and a labor party agree to restrain competition in a business market. 421 U.S. at 622, 623, 95 S.Ct. at 1835.

The *Connell* decision emphasized the fact that the Connell—Local 100 contract was not part of a collective bargaining agreement. The court reasoned, "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement." 421 U.S. at 625, 626, 95 S.Ct. at 136-1837.

Considering the prominent distinguishing factors between *Connell* and the instant case, the Court is not compelled to follow *Connell's* disallowance of the non-statutory labor exemption. Thus, the *Connell* precedent offers a negative instructive by its determination of a situation not warranting the exemption. The Court has not been presented with any outside agreement containing the exclusionary measures found to restrain competition in *Connell.* A key element in *Connell* was that the union did not seek to represent and did not represent Connell's employees. It was also found that successful execution of

the union strategy in *Connell* could have given the union the power to exclude subcontractors from the Dallas area. This potential has not been shown to exist in the instant case. Plaintiffs' allegation that defendants employ of construction workers "who, but for the illegal combinations and monopolies, all in restraint of trade and commerce, would have been covered by the collective bargaining agreements" (Plaintiffs' complaint, p. 6) does not transform this labor controversy into a justiciable antitrust cause of action.

Essentially, plaintiffs' dissatisfaction results not from an antitrust violation, but from the AGC's not having bargained collectively with the unions regarding *Halmar's* employment terms and conditions. The National Labor Relations Act, Section 8(a)(5) regulates such conduct by providing that "It shall be an unfair labor practice for an employer ... to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. § 159(a)]." 29 U.S.C. § 158(a)(5). The Fifth Circuit recognized these divisional lines in *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America*, 431 F.2d 1004 (5th Cir. 1970). The union there claimed the attempted destruction of its operations through a conspiracy between Bluebell, Inc. and Prepmore. Bluebell allegedly agreed to aid Prepmore's hindrance of the union's employee representation. Upon Prepmore's suit claiming damages arising out of the resulting union strike, the union countered with a Sherman Act claim and a state law damage claim for interference with union business. The Fifth Circuit affirmed the district court's Rule 12(b)(6) dismissal of both counts. As to count one, the court held:

The facts here go to a refusal to deal with the

> union with respect to conditions of employment, ordinarily a violation of § 8(a)(5) of the National Labor Relations Act, 29 U.S.C.A. § 158(a)(5). There is no indication, however remote, of a conspiracy or a combination on the part of Prepmore and Bluebell to restrain competition in the marketing of Prepmore's goods. In sum, the allegations of the first count of the counterclaim do not rise to the level of alleging a restraint of the type to which the Sherman Act is directed. 431 F.2d at 1007.

The second count was dismissed on the preemption doctrine.

> The claim asserted in the second count, considered in the light of the facts alleged, falls short of the violence or threat to public order category saved for state regulation under the San Diego Building Trades Council case. This count is no more than a claim that Prepmore and Bluebell, together with their officers, conspired to unlawfully hinder and prevent the union from carrying on its lawful trade or calling. Taken in the context of the first count, this lawful calling consisted of a labor organization acting in a representative capacity in the area of negotiations concerning wages and other working conditions in the Prepmore plant and the consequent refusal to bargain. This claim is arguably within the confines of a refusal to bargain; conduct prohibited by § 8(a)(5) of the Labor Act, 29 U.S.C.A. § 158(a)(5). It was thus preempted. 431 F.2d at 1008.

In *Amalgamated Clothing and Textile Workers v. J. P. Stevens & Co.*, 475 F.Supp. 482 (S.D.N.Y.1979), a union invoked the Sherman and Clayton Acts for relief in its

ongoing struggle to organize the defendant Stevens, who contended that the parties should continue their battle "up and down the halls of the NLRB." The court found that the union had sufficient standing to assert the antitrust claim; the court nonetheless dismissed for failure to state a cause of action. Reiterating Professor Cox's oft-quoted proposition that "No one seriously suggests that anti-trust policy should be concerned with the labor market per se," Cox, *supra*, at 254, the court held:

> These authorities are dispositive, and require dismissal of the antitrust claims. The claims alleged "arguably" fall within the labor laws; indeed, a number of them virtually parrot statutory definitions of unfair labor practices. The antitrust laws do not furnish a remedy, since ACTWU's allegations, taken separately or in concert do no more than complain of efforts to impede its activities as a union, entirely unaccompanied or uncomplicated by any element of monopolistic effect upon competition in the marketplace for goods and services. As such, the allegations do not rise to the level of an antitrust violation; and in consequence there is no basis to depart from the rule of Garmon and Lockridge, supra.[4] 475 F.Supp. at 490

The controversy in *Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133 (8th Cir. 1979) centered around an agreement whereby a wholesaler lent employees

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[4] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) and *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971) did not involve antitrust claims. These cases' importance stems from their recognition of the NLRB's exclusive competence over any activity "arguably subject" to § 7 or § 8 of the National Labor Relations Act and, as such, the resulting preemption of state and federal court jurisdiction.

to a retail food supplier on a temporary basis to perform retail meat cutting during an economic strike. Upon the union's action under, *inter alia*, the Sherman Act, the Eighth Circuit upheld a district court's dismissal for failure to state a claim. "The District Court found that the complaint portrayed a labor dispute between union and employer and held that since federal labor laws clearly sanctioned the conduct involved, it could not give rise to an antitrust violation." 597 F.2d at 134 (footnotes omitted). The court stated that the antitrust laws were not enacted to regulate labor relations. Equally applicable to the instant case is the court's pronouncement:

> Federal labor policy sanctions both the goal of resisting union demands and the method of replacing striking workers and the magnitude and nature of any restraint of trade or commerce in this case directly follows from the sanctioned conduct. The agreement had no anticompetitive effect unrelated to the collective bargaining negotiations. (footnote omitted) 597 F.2d at 136.

Furthermore, it is vital to recognize the implications of an unduly expansive use of the antitrust remedies. The Court takes cognizance of the foreseeable abuse that could result if the Sherman Act were invoked in contexts other than that for which it was originally tailored. That is, the Act, "was enacted in the era of 'trusts' and of 'combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-493, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). The Act was aimed at business combinations and not labor unions. Thus, this

Court's refusal to adjudicate the instant Sherman and Clayton Act claims stems from a refusal to extend the Sherman Act beyond its bounds into an area governed by the comprehensive regulatory scheme provided by the National Labor Relations Act.[5]

The Sherman Act is not "a panacea for all business affronts which seem to fit nowhere else." *Scranton Construction Company, Inc. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), cert. denied, 419 U.S. 1105, 95 S.Ct. 774, 42 L.Ed.2d 800 (1974).[6] Owing to the Sherman Act's vital role in the free economy's preservation, its indiscriminate application would undermine the remedy's service. The Act's purposes "are best served by vigorous enforcement of it in the cases in which it was intended to apply, i.e., cases in which restriction or monopolization of trade or commerce are the object or the result of [the] defendant's conduct." *Parmelee Transportation Company v. Keeshin*, 186 F.Supp. 533, 547 (N.D.Ill. 1960), aff'd, 292 F.2d 794 (7th Cir. 1961), cert. denied,

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[5] *Cf. Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976) wherein the Fifth Circuit considered the standing requirements relative to an antitrust action. The court held that injury to employment opportunities or to a union's business activities would provide sufficient grounds for institution of a Sherman Act and Clayton Act suit upon the requisite showing. The complainant must prove that he was in the "target area" of the conspiracy and that the injuries to the "commercial interests or enterprises" were proximately caused by the anticompetitive combination. The *Tugboat* case, however, offers no dispositive guidance to the instant adjudication. That court specifically declined to reach the question of whether the labor regulatory scheme would remove the case from antitrust protection. 534 F.2d at 1174.

[6] See also, *Spectrofuge Corporation v. Beckman Instruments, Inc.*, 575 F.2d 256, 290 (5th Cir. 1978); *Natrona Service, Inc. v. Continental Oil*, 435 F.Supp. 99, 111 (DWyoming, 1977); *In Re Multidisrict Vehicle Air Pollution*, 367 F.Supp. 1298, 1304 (C.D.Cal.1973); aff'd 538 F.2d 231 (9th Cir. 1976); *Industrial Building Materials, Inc. v. Interchemical Corp.*, 278 F.Supp. 938, 959 (C.D.Cal.1967).

368 U.S. 944, 82 S.Ct. 376, 7 L.Ed.2d 340 (1961).

Rather than its misconception as a universal commercial remedy—which leads to its frequent invocation—the Sherman Act represents a charter of economic freedom operating within the 'objective benchmarks' of market considerations. *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978).[7] The legislation has been described as the "Magna Carta of free enterprise.' " Its importance to economic freedom, then, has been analogized to the personal freedom insurance of the Bill of Rights. *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir. 1978), quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1971). In *Sitkin Smelting & Refining Co.*, the court continued by recognizing the Bill of Rights' inapplicability to *all* personal affront and likening these limits to the Sherman Act's unsuitability for proscribing *all* unseemly business practices. Even though that court found the controverted manipulation of businessmen's bids to be "clearly reprehensible," the court stated that the Sherman Act could not be "extended beyond its intended scope and used to police the morals of the marketplace." 575 F.2d at 448.

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[7] The quoted phrase derives from *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549], 53 L.Ed.2d 568, n. 21 (1977). Continuing the quoted footnote:

> ...Competitive economies have social and political as well as economic advantages, see e.g., *Northern Pac. R. Co. v. United States*, 356 U.S. [1] at 4, 78 S.Ct. [514], at 517 [2 L.Ed.2d 545], but an antitrust policy divorced from market considerations would lack any *objective benchmark*. As Mr. Justice Brandeis reminded us: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Board of Trade v. United States*, 246 U.S. [231], at 238, 38 S.Ct. [242], at 244 [62 L.Ed. 683]... (emphasis supplied)

Any adjudication involving the antitrust laws, then, must examine the *economic reality* of the relevant transaction. *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 208, 89 S.Ct. 361, 367, 21 L.Ed.2d 344 (1968) (emphasis supplied)

The plaintiffs' efforts represent yet another judicial attempt at conforming a square peg to a round hole. The antitrust laws will not assuage nor cure the defendants' alleged circumvention of the "Craft Agreement." Accordingly, they do not provide the proper redress to alleviate the effects of *Farnsworth's* alleged creation and operation of *Halmar*.

California State Council of Carpenters v. Associated General Contractors of California, Inc., supra, presents a similar situation to the case at bar. Plaintiff unions filed a five-count complaint alleging a general conspiracy to weaken and destroy them by hiring nonunion employees. The court based plaintiffs' allegations of antitrust law violations on the defendants' declination to enter into agreements with plaintiffs that would oblige them to deal only with subcontractors which were signatories to contracts with the plaintiffs. Such contracts were viewed as the precise type of agreement creating the *Connell* union's antitrust liability. That is, the *Connell* court sustained an antitrust claim based on the union's exerted pressure against an employer to enter into the type agreement in which the defendant employers in *California State Council* refused to participate. Review of the *Connell* holding and the considerable body of case law declining to recognize an antitrust cause of action alleged by a union against an employer in the normal type of labor dispute mandated the court's dismissal of the antitrust claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Crucial to these

determinations stands the distinction that "[W]hile an *agreement between* a union and an employer to conspire in some respect may give rise to an antitrust violation, the normal labor *dispute between* union and employer does not. 404 F.Supp. at 1069. (citations omitted).

"While this motion was under submission, the Ninth Circuit reversed the district court's dismissal in *California State Council, supra*, for failure to state a claim upon which relief could be granted. In retaining the Sherman Act claims, the court in *Carpenters v. General Contractors*, 648 F.2d 527, 105 LRRM 3311 (9th Cir. 1980) negated the previously-found nonstatutory labor exemption from antitrust liability. At the core of the majority's substantiation lay a recharacterization of the plaintiffs' complaint. The appellate court found that the unions had alleged an agreement "to coerce owners of property, general contractors, and 'other letters of construction contracts,' with whom the Unions had no collective bargaining relationship, to hire only construction firms, primarily subcontractors, who had not signed with the Unions." at 532, 105 LRRM at 3314-15. In this posture, the case presented "virtually the obverse" of the *Connell* situation; with the same threat posed by both the *California State Council* employers' group and the *Connell* union, it was suggested that application of the *Connell* rationale would lie "with at least equal force." at 532, 105 LRRM at 3315. By contrast, the district court's characterization resulted in a finding that the defendants avoided the activity prohibited on Connell by their *non-conduct.*[8]

[8] The relevant portion of the plaintiffs' amended complaint charges that defendants "advocated, encouraged, induced, coerced, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them; ..."

This Court is not bound by the Ninth Circuit precedent, and finds the majority's disposition of the case unpersuasive. Thus, the Court must decline to follow its pendulated interpretation of what, this Court believes, was a correct district court result. The dissenting opinion by Circuit Court Judge Sneed is enlightening.

The dissent was premised on the rationale that the majority had mischaracterized the complaint, disagreeing with its depiction as "flip side" of *Connell*. It agreed with the district court's characterization, reiterating that, assuming the requisite proof of the antitrust allegations, the complaint's claim would permit unions to achieve precisely what *Connell* prohibited.

> That is, employers with whom plaintiffs have no collective bargaining relationship will be eliminated from the relevant market with the resulting impairment of competition. This will come about not because of an agreement by employers with the plaintiffs of the type condemned by Connell, but because the now real threat of antitrust liability will divert virtually all subcontracting to employers having a collective bargaining relationship with the plaintiffs. Those with a taste for irony will no doubt savor the spectacle of *Connell* self-destructing. at 542, 105 LRRM at 3322.

The dissent found that the plaintiffs' basic allegation of injury was impairment to their representation of construction industry workers. Without the restraint upon commercial competition in the marketing of goods and services, see *Apex Hosiery Co. v. Leader, supra*, such an injury was not within the ambit of antitrust law. The dissent therefore directed redress pursuant to the terms of the

National Labor Relations Act. 29 U.S.C. § 151 (1976). See *Motor Coach Employees v. Lockridge, supra; San Diego Building Trades Council v. Garmon, supra.*

The *Carpenters* case, then, presents a strikingly similar situation to the case at bar. The plaintiffs have complained of their representational efforts' impairment by *Farnsworth* and *Halmar* which this Court cannot translate into a justiciable antitrust claim. Their action is solely cognizable under the comprehensive labor regulatory scheme of the N.L.R.A. The antitrust law provides no alternative, substitute, nor supplemental remedy in a bargaining dispute.

The *Carpenters'* dissent also rejects the majority's justification for the action's justiciability under the Sherman Act. That is, the majority found that the complaint alleged a conspiracy directed at employers which otherwise would have entered into collective bargaining agreement with plaintiffs. The dissent attacked this reasoning in light of the economic realities of employer-employee relations. This Court is in accord with the dissent in its criticism of the majority's unfounded assumption of a casual relationship between employers without collective bargaining agreements and an economically significant injury. The dissent pointed to the possibility that such employers could even be more profitable than those bound by an agreement.

In the *Carpenters* case, the employers without agreements were absent from the lawsuit. Their absence reinforced the dissent's conclusion that the plaintiffs' complaint stemmed solely from injury to the representational efforts. Even though *Halmar* is a party to this action, the dissent's reasoning applies to the extent that this Court

cannot engage in the speculation that would be necessary to justify the leap that the fact of *Halmar's* nonparticipation in the Craft Agreement has resulted in economic injury to plaintiffs. The plaintiffs are complaining because of *Halmar's* position as a construction industry employer which is not contractually bound to the obligations existing between *Farnsworth* and plaintiffs.

I reach the conclusion so well-stated by the *Carpenters'* dissent. "When all is said and done, this is a labor case wearing an antitrust costume and inspired no doubt by the employer victory in *Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra.* It should remain a labor case." at 543, 105 LRRM at 3323.

CONCLUSION

Based on the foregoing authorities and analysis, the Court hereby GRANTS the motion to dismiss brought by Pratt-Farnsworth, Inc.; Halmar, Inc.; Associated General Contractors of Louisiana, Inc., New Orleans District, and Associated General Contractors of Louisiana, At Large District.

APPENDIX "D"

THE LABOR MANAGEMENT RELATIONS ACT STATES IN PERTINENT PART:

29 USC §185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

THE CLAYTON ANTITRUST ACT STATES IN PERTINENT PART:

15 USC §17

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

29 USC §52

No restraining order or injunction shall be granted

by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or pursuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully pursuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or pursuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other monies or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 USC §53

The word "person" or "persons" wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

THE SHERMAN ANTITRUST ACT STATES IN PERTINENT PART:

15 USC §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 USC §2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 USC §4

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

15 USC §7

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

THE NORRIS-LAGUARDIA ACT STATES IN PERTINENT PART:

29 USC §113

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

THE NATIONAL LABOR RELATIONS ACT STATES IN PERTINENT PART:

29 USC §159

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof....

29 USC §160

(e) The Board shall have power to petition any court of appeals of the United States...wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order....

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of

Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. ...Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board....

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CARPENTERS LOCAL UNION NO. 1846
of the UNITED BROTHERHOOD OF
CARPENTERS and JOINERS OF AMERICA,
AFL-CIO

and CIVIL ACTION

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS and VICINITY PENSION TRUST NO. 80-1570

SECTION I

and MAGISTRATE
DIVISION 2

CARPENTERS DISTRICT COUNCIL OF
NEW ORLEANS and VICINITY HEALTH
and WELFARE PLAN

and

CARPENTERS DISTRICT COUNCIL OF
NEW ORLEANS and VICINITY APPRENTICESHIP
EDUCATIONAL and TRAINING PROGRAM

and

WILLIAM JOHN FORTNEY, KENNETH J.
PERKINS, DONALD C. HAYNES, RAYFORD
H. COLAMARI, LOTHARD J. BROUSSARD, SR.,
FRANKLIN B. HUNTER, ELAIRE DAUZAT,
DENNIS J. SAVOY, LAWRENCE J. ROUSSELLE,
DESIRE BERGERON, VERNON D. HARVEY, and
WILLIAM J. BRIGNAC, JR. (HEREINAFTER
CLASS I)

and

JAMES E. CRAWFORD, LAWLESS J. MARTIN, ROBERT BROWN, CHARLES MITCHELL, NATHANIEL E. WILLIAMS, JOHNNIE WILLIAMS, FRED SCOTT and LEE R. MISKELL (HEREINAFTER CLASS II)

and

JAMES E. CRAWFORD, LAWLESS J. MARTIN, ROBERT BROWN, NATHANIEL E. WILLIAMS and LEE R. MISKELL (HEREINAFTER CLASS III)

VERSUS

PRATT-FARNSWORTH, INC., HALMAR, INC., NEW ORLEANS DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LOUISIANS, INC., AT LARGE DISTRICT, ASSOCIATED GENERAL CONTRACTORS OF LOUISIANA, INC.

COMPLAINT

NOW COMES the plaintiffs, Carpenters Local Union No. 1846 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Carpenters District Council of New Orleans and Vicinity Pension Fund, Carpenters District Council of New Orleans and Vicinity Health and Welfare Plan, Carpenters District Council of New Orleans and Vicinity Apprenticeship Educational and Training Program, and above plaintiffs named of Class I, Class II, and Class III, complaining of the defendants, Pratt-Farnsworth, Inc., Halmar, Inc., New Orleans District, Associated General Contractors of Louisiana, Inc., and At Large District, Associated General Contractors of Louisiana, Inc. (hereinafter jointly referred to as Defendant), and allege as follows:

COUNT ONE

1. This action arises under the Employee Retirement Income Security Act of 1974 (U.S.C., Title 29, §1132), the Labor Management Relations Act, as amended, (U.S.C., Title 29, Chapter 7, §185(a) and the Clayton and Sherman Anti-Trust Acts (U.S.C., Title 15, §12-27 and Title 28, §1332 et seq.) as hereinafter more fully appears. Jurisdiction is founded on the existence of questions arising thereunder.

2. The plaintiff trustees, individually and as trustees, named above, administer the funds of the respective trusts, pursuant to the terms and provisions of the Agreements and Declarations of Trusts pertaining thereto.

The Funds are required to be maintained and administered in accordance with the provisions of the Labor Management Relations Act of 1947, as amended, the Employee Retirement Income Security Act of 1974, and other applicable State and Federal laws.

3. The Funds have been established for the purpose of providing and maintaining pension and health and welfare benefits for certain employees, individuals represented by certain local unions, including Locals 1846 and 2436, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, who have entered into collective bargaining agreements with the employers of such employees, requiring payments by such employers into Trust Funds for the purpose heretofore mentioned.

The address and place of business of the Funds is 1407 Decatur Street, New Orleans, Louisiana.

4. Carpenters Local Union No. 1846 and Pile Drivers Local Union 2436 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO are unincorporated labor organizations engaged in the business of representing employees in industries affecting interstate commerce and have domiciles at 315 South Broad Street, New Orleans, Louisiana and 2512 Elysian Fields Avenue, New Orleans, Louisiana, respectively.

5. Defendants Pratt-Farnsworth, Inc. and Halmar, Inc., both Louisiana Corporations, are and at all times material herein have been affiliated business enterprises, with common ownership and management, centralized control of labor relations, sharing of equipment and other assets, and employees and they constitute a single integrated business enterprise, doing business within the geographic jurisdiction of the Court, and constituting a single employer for all purposes relevant thereto. The defendants, as such business enterprise and employer, are engaged in an industry affecting commerce who has and continues to do business within the geographic jurisdiction of the Court, and/or are "single employers" within the meaning of the NLRA and §1563(a) of Internal Revenue Code Regulations, as amended.

5(a). Defendants New Orleans District, Associated General Contractors of Louisiana, Inc., and At Large District, Associated General Contractors of Louisiana, Inc. are associations that represent and provide various services for employers engaged in the building and construction trades industry, such as defendants herein. The A.G.C. offices are located at 1500 S. Jefferson Davis Parkway, New Orleans, Louisiana.

6. Defendants, who are employers engaged in the

building and construction industry, are bound by the provisions contained in the collective bargaining agreements between New Orleans District, Associated General Contractors of Louisiana, Inc. and Carpenters District Council of New Orleans and Vicinity.

7. The defendants are affiliated with the New Orleans District and At Large District of the Associated General Contractors of Louisiana, Inc. (hereinafter called A.G.C.). Defendant A.G.C. is authorized in behalf of its affiliated member employer to bargain in their behalf with the Carpenters District Council of New Orleans and Vicinity over wages, terms and conditions of employment.

7(a). Defendants Pratt-Farnsworth, Inc., a/k/a Halmar, for all acts and times referred to herein, voluntarily assigned its bargaining rights to, and became a member of, the A.G.C. of Louisiana, Inc., thereby effectively merging this member employer (to-wit: Pratt-Farnsworth, Inc., a/k/a Halmar, Inc.) with other member employers of the A.G.C. of Louisiana, Inc. as one industry-wide collective bargaining unit.

8. Under authority of F.R. Rule 23, this action is brought as a class action on behalf of each and all other persons similarly situated who are members of and/or seeking employment through Locals 1846 and 2436 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and all participants and beneficiaries of the Pension, Health & Welfare and Apprenticeship Funds named as plaintiffs herein.

The right which is subject matter under this action is common to all members of this class, and there are questions of law and of fact that are common to each member of

the class. Claims of the named plaintiffs are typical of the claims of other members of the class similarly situated and the plaintiffs will fairly and adequately protect and represent the interests of each as required by Rule 23.

9. During the terms of the collective bargaining agreement between the AGC and Carpenters District Council, described as the "Craft Agreement", defendant employer Pratt-Farnsworth conspired with the knowledge and assent of the AGC and unknown labor persuaders (29 U.S.C., §433 (b)) to establish and operate Halmar in order to circumvent and evade the Craft Agreement provisions and create a union-free environment.

10. The Defendants have engaged in an unlawful combination and conspiracy in restraint of interstate commerce and trade in violation of the Clayton and Sherman Anti-Trust Acts.

Such acts, conspiracies and monopolies were between the named defendans and consist of:

(a) To help and control and monopolize construction jobs in New Orleans and vicinity.

(b) To eliminate the Plaintiff-Union from the building and construction industry in New Orleans and vicinity by entering into agreements with owners and builders, whereby such owners and builders utilize contractors who do not have agreements with the Plaintiff-Union.

(c) To eliminate Plaintiff-Unions as a meaningful and effective representatives of their members.

(d) To injure the Plaintiff-Unions' ability to organize workers and attract membership.

(e) To create a monopoly among open-shop contractors who regulate labor costs, set prices, wages and costs in restraint of trade.

(f) To conspire to undermine and abrogate collective bargaining agreements between plaintiff and defendant.

(g) All defendants have conspired and colluded to create a dual labor pool in violations of the hiring hall provisions of the Craft Agreement. Said collusions and unfair trade practices have unlawfully denied the class plaintiffs the right to work and earn wages, pensions, welfare, and other benefits, and/or have had their employment opportunities reduced.

(h) The defendants have acted in such fashion as to constitute a pattern and practice of discrimination against the plaintiffs resulting in reduced work opportunities, lower wages, lesser working conditions, diminuation of fringe benefits; a dilution in the vested rights and benefits of the class plaintiffs pension, welfare, hospitalization, and apprenticeship funds; and an overall substantial reduction in the membership enrollment of the plaintiff's unions.

(i) The defendants jointly and in concert have conspired and schemed effectively to have other union contractor-members of the AGC to engage in a pattern and practice of creating so called "double-breasted" contractors for the purpose of evading obligations under the Craft Agreement.

11. The defendants are employing construction workers who, but for the illegal combinations and monopolies, all in restraint of trade and commerce, would have been covered by the collective bargaining agreements

negotiated as area standards in the jurisdiction of this Court by the Plaintiff Unions. Such construction workers are not being paid the various fringe benefits, which to a class plaintiff would amount to such items as contributions to Health and Welfare and Pension and Apprenticeship Trust Funds.

Plaintiffs show further to the Court that defendants and each of them are guilty to the violations of the Anti-Trust Laws as hereinabove set out, and that said Employers-Defendants are engaged in the construction industry and have maintained membership in various open-shop associations purportedly representing the building construction industry with the main purpose of eliminating membership in or the use of members of the Plaintiff Unions, secure favored economic conditions and gain market domination.

12. Such associations and its employer members are not immune from Anti-Trust Laws since by illegally combining to agree to pay lower wages and conditions by monopolizing the New Orleans and vicinity building and construction industry, it would be restraining competition and raising prices by the restraining of competition. The defendant AGC Contractors have illegally combined and agreed to this monopoly by open-shop contractors, notably those represented by the At Large District of the AGC of Louisiana, Inc., so as themselves would be able to be given a share of this market from owners and builders who do not wish to do business with contractors having collective bargaining agreements with your plaintiff.

13. Unions such as the plaintiffs herein, representing construction workers and union members, have standing to bring Anti-Trust suits against corporations represent-

ing construction contractors and non-incorporated associations on the grounds that the defendants have conspired and created corporations to restrain trade and eliminate competition in construction industry with the object of preventing plaintiffs from representing employees.

14. The established acts and agreements and conspiracies of the defendants have caused a complete duplication within the construction industry and certain employers of an illegal nature, and in fact has significantly reduced the industry-wide bargaining unit as contracted for by plaintiffs and defendant AGC Contractors, and by such actions have violated the Anti-Trust Laws and entitle plaintiffs to recover treble damages, injunctive relief, the cost of suit, including reasonable attorneys fees.

15. Further, the acts of the defendants as hereinabove set out has created a breakdown of competitive conditions, and the plaintiffs are within the sector of the economy which has been endangered by being deprived of a work opportunity by and for plaintiff union's members as secured by the Craft Agreement.

16. By virtue of provisions contained in the collective bargaining agreements which defendants are bound by, defendants did promise and become obligated to make contributions, in amounts set forth below, to said Funds on behalf of its employees for each hour or portion thereof worked or for which wages were received by such employees, and class plaintiffs, from May 1, 1971, through the present, and continuing during the pendency of this litigation.

17. Defendants have agreed in the collective bargaining agreements that failure to make prompt payment of

contributions required to be made thereunder shall constitute a violation of said agreement by the defendant. Defendant is further required, pursuant to the provisions of the Agreements and Declarations of Trusts governing the Funds, to make all reports on contributions required by the Trustees.

18. Pursuant to provisions contained in the Agreements and Declarations of Trusts governing the Funds and the collective bargaining agreements the Trustees acting thereunder are authorized and empowered to have an audit made by independant certified public accountants of the payroll and wage records of a signatory employers to permit such Trustees to determine whether an employer is making full and accurate payment and prompt submission of reports pertaining thereto as required under the applicable collective bargaining agreements.

19. Notwithstanding the aforementioned provisions of the Agreements and Declarations of Trusts, all costs and reasonable attorney's fees incurred in the action may be recovered from the defendants pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(g).

COUNT TWO

1. Named members of the Class I hereinabove, hereby re-urge and reiterate all of the allegations as contained in Count One, as if copied herein in extenso.

COUNT THREE

1. Named members of Class II hereinabove, hereby re-urge and reiterate all of the allegations as contained in

Count One above, as if copied herein in extenso.

COUNT FOUR

1. Named members of Class III hereinabove, hereby re-urge and reiterate all of the allegations as contained in Count One above, as if copied herein in extenso.

WHEREFORE, plaintiffs pray:

1. This cause of action be certified as a class actions as provided by Federal Rule 23.

2. The named plaintiffs be certified to represent the class.

3. The plaintiffs recover treble damages sustained by them plus costs of suit including reasonable attorneys' fees as authorized by Section 15 of the Clayton Act.

4. The plaintiffs pray for such other relief as may be justly and properly determined, including injunctive relief as provided in 15 U.S.C. §26.

5. That the herein alleged combination and conspiracy between the defendants be adjudged and decreed to be an unreasonable restraint of interstate trade and commerce, unlawful, and in violation of Section I of the Sherman Act (15 U.S.C.A. 1).

6. That the amount of damages the plaintiffs have sustained by reason of the unlawful acts of the defendants, which are not now definitely ascertainable but which will be proved with certainty at the time of the trial, be ascertained and assessed and the defendants be ordered to pay

to the plaintiffs three (3) times the amount of such damages;

7. That plaintiffs recover its litigation expenses, including attorneys' fees, as provided by Section 4 of the Clayton Act (15 U.S.C.A. 15);

8. That plaintiffs recover such other amounts and have such other and further relief as the Court shall deem just;

9. That defendants be ordered to abide by the terms and conditions of the Craft Agreement retroactively from May 1, 1971, to date, and any amendments, modifications or extensions and any new agreements entered into the A.G.C.;

10. That an account be taken as to all employees of defendant covered by the collective bargaining agreements from May 1, 1971, to the present, as to wages received and hours worked by such employees to determine amount required to be paid to the Trustees of the respective Funds, covering the period during which defendant has been delinquent, i.e. May 1, 1971 to date;

11. That defendant be specifically required to perform and continue to perform all obligations on defendants' part undertaken, particularly to furnish promptly to the Trustees of the respective Funds, the required contribution reports heretofore referred to, or in lieu thereof, a statement covering the period for which said reports are required that defendants had no employees for whom contributions were required to be made;

12. That defendants be decreed to pay to the Trustees

of the respective Funds, the full amount determined to be due and owing upon completion of the audit referred to above, together with legal interest, and all costs of collection, all as provided in the collective bargaining agreements and the Agreements and Declarations of Trusts, which provisions are set out above.

13. That defendants be ordered to pay all costs attendant to any audit of defendants' payroll books and records, as a penalty and cost of collection, all as provided in the collective bargaining agreements and in the Agreements and Declarations of Trusts for the respective Trust Funds. That defendants be decreed to pay to the Trustees their reasonable attorneys' fees as in the collective bargaining agreements and in the Agreements and Declarations of Trust provided and as required by the provisions of the U.S.C., Title 29, Section 1132(g), together with the costs of suit; and

14. That plaintiffs have such other and further relief as this Court may deem proper.

Respectfully Submitted,

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No. 82-1414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PRATT-FARNSWORTH, INC., *et al.*,
Petitioners,

v.

CARPENTERS LOCAL UNION NO. 1846, ETC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

We adopt as our statement of the case the portion of the court of appeals' opinion entitled "Factual and Procedural Background." (690 F.2d at 497-500.) Indeed, we were tempted, in lieu of a brief in opposition, to rest on an invitation to the Court to read Judge Randall's entire opinion for the court below, which deals in an exceptionally thorough and thoughtful manner with all the issues presented in the *certiorari* petition. However, while we cannot hope to improve upon the court of appeals' analysis, we have concluded that we may be able to aid this Court by demonstrating the patent inadequacies of the petitioners' response to that analysis and by focusing on the further grounds why this Court's standards for granting a writ of *certiorari* have not been met. In the latter regard, we shall stress: (1) the *interlocutory*

stage of this litigation (underlined by the court of appeals' careful disclaimer of any resolution on the merits)[1]; (2) the error of petitioners' claim that the decision below conflicts with decisions of this Court and other courts; and (3) petitioners' failure in its third and fourth question to present general questions of law, by instead objecting only to the court of appeals' *interpretation of the agreement and pleadings in this case.*

REASONS FOR DENYING THE PETITION

A. Questions I & II Presented By Petitioners Do Not Warrant This Court's Review.[2]

(i) Petitioners' principal contention is that the decision of the court of appeals reinstating the contract claims against Pratt-Farnsworth and Halmar is contrary to *South Prairie Constr. v. Operating Engineers*, 425 U.S. 800 (hereafter "*Peter Kiewit*"). For convenience, we reiterate petitioners' description of *Peter Kiewit*:

> In that case, the Board had decided that the two operations in a "double-breasted" construction entity were separate employers. The Court of Appeals reversed, finding the companies to be a single employer, and the employees a single bargaining unit. The Supreme Court reversed on this issue stating that for the Court of Appeals to "take upon itself the initial determination of this issues was "*incompatible with the orderly function of the process of judicial review.*" 425 U.S. at 805. [Pet. 7; emphasis added.][3]

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[1] The district court had dismissed the complaint in its entirety. The court of appeals "affirm[ed] the dismissal of certain claims, revers[ed] the dismissal of others, and remand[ed] to the district court for further proceedings and development of a more complete factual record." (690 F.2d at 497; see also *id.* at 536-537.)

[2] These two questions are on their face closely linked and are discussed together in the petition at pp. 5-19.

[3] We note that while petitioners question whether "a district court has authority to determine whether two construction companies are

Petitioners continue by placing special reliance on the following sentence from *Peter Kiewit*:

> Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, "if not final, is rarely to be disturbed," *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491, we think the function of the Court of Appeals ended when the Board's error on the "employer" issue was "laid bare." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). [425 U.S. at 806, quoted at Pet. 7.]

In a painstaking discussion of *Peter Kiewit* (690 F.2d at 513-517), the court of appeals concluded that this Court negated only the authority of the courts to decide bargaining unit issues in the first instance when these arise on review of a National Labor Relations Board decision. The court below especially disagreed with the view that the above-quoted sentence "stands for the proposition for which it and *Peter Kiewit* are cited by the defendants—that the Board has exclusive jurisdiction to decide appropriateness of the bargaining unit issues" (690 F.2d at 514):

> We think instead that the Court in *Peter Kiewit* was applying a time-honored principle relating to appellate review of an agency determination. When an agency, in order to grant relief in the case before it, must as a matter of statute find that both factual or legal conclusion A (e.g., single employer status) and factual or legal conclusion B (e.g., appropriateness

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a single employer" (Pet. i. Question 2), no argument to the contrary is presented. And while petitioners also raise a question as to whether a court may decide "whether the union represents a majority of the employees in [a] single unit" and "whether or not [the] unions enjoy a majority status" (*id.* i; 5-6), petitioners have not presented any facts raising a question as to whether the respondent union represented a majority of Pratt-Farnsworth's employees. Finally, if as is alleged in the complaint, Halmar is the alter ego of Pratt-Farnsworth, Halmar would in any event be bound by Pratt-Farnsworth's contract. (See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259.)

of the bargaining unit) have been established, but concludes that A had not been established and therefore declines to consider whether B has been established, a reviewing court that reverses the conclusion that A has not been established must remand to the agency to permit it to consider in the first instance whether B has been established.

Section 9(b), which is the source of the Board's responsibility in an unfair labor practice context to make a determination of the appropriateness of the bargaining unit in a single employer case such as *Peter Kiewit*, and which is set forth in the Supreme Court's opinion in *Peter Kiewit*, directs the Board to "decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA] the unit appropriate for the purposes of collective bargaining shall be the employer unit craft unit, plant unit or subdivision thereof. . ." 29 U.S.C. § 159(b) (emphasis added). Clearly section 9(b) refers only to cases pending before the Board under the NLRA. *Neither section 9(b) nor the Supreme Court's decision in Peter Kiewit stands for the proposition that a federal court with jurisdiction under section 301 of the LMRA to decide cases alleging a breach of a collective bargaining agreement by related employers does not have jurisdiction to determine whether a bargaining unit comprising the employees of such employers is appropriate where such a determination is necessary to a resolution of the breach of contract issue that is consistent with national labor policy.* [690 F. 2d at 514-515; emphasis added]

We agree with petitioners' response to the foregoing in so far as that response rests on the proposition that "putting the [quoted] sentence [from *Peter Kiewit*] 'in context' requires a review of [the] earlier case" which had been cited and quoted in *Peter Kiewit*—*viz.*, *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491. (Pet. 7.) But petitioners' discussion of *Packard* (Pet. 7-8) overlooks the

critical point—that *Packard* itself was decided on review of a decision of the Labor Board, and turned on the appropriate scope of judicial review of Board decisions. (330 U.S. at 491.) Indeed, not only *Peter Kiewit*, but every one of this Court's decisions cited therein deals with the proper exercise of the courts' authority to review the decisions of administrative agencies. Neither *Peter Kiewit* nor any of the cited cases deals with § 301 of the LMRA or with any other provision of law which grants original jurisdiction to the courts. Thus, the court of appeals' interpretation of *Peter Kiewit* is confirmed by the latter's citation of *Packard*, as well as by the citation in the same sentence of *FPC v. Idaho Power Co.*, 344 U.S. 17, 20, which likewise dealt with the proper relationship between courts and administrative agencies, and, of course, was not remotely concerned with bargaining units.

In sum, petitioners' contention that the court of appeals in this case has not "properly applied" *Peter Kiewit* (Pet. i) is entirely insubstantial.

(ii) The fundamental difference between the *Peter Kiewit* case and this case just discussed, is decisive also in determining whether this is an appropriate vehicle for reviewing the related question presented by the petition: "Whether a district court has, in the first instance, authority to determine an appropriate bargaining unit." (Pet. i). For at least at this stage of the litigation petitioners have not established that the district court will *ever* have to "determine an appropriate bargaining unit" in order to adjudicate this case. Such a determination was essential in *Peter Kiewit* because the employers there were charged with an unfair labor practice under § 8(a)(5) of the National Labor Relations Act, which makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 of this Act." Section 9(a), which is thus incorporated by reference in § 8(a)(5) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * * [emphasis added]

A union's status as majority representative in a § 9(a) bargaining unit is therefore an essential element of a § 8(a)(5) unfair labor practice such as was charged in *Peter Kiewit*. And even where the union represents a majority in some bargaining unit, there can be no violation of § 8(a)(5) unless that unit is "appropriate".[4] Section 301(a), however, does not refer to § 9(a); nor does § 301 in any other way provide that a contract is enforceable only if the contract covers an appropriate bargaining unit. Thus, there is nothing inherent in a claim under § 301 requiring a district court to decide a unit issue as a condition for granting relief under § 301.

To be sure, cases can arise in which a contract claim is merely a disguised effort to secure representation over employees without recourse to the processes of the NLRB under § 9(a). In such a case the court need not and should not permit its processes to be abused. But it will be a rare case in which a claim can be so characterized at the complaint stage. And in *this* complaint there is no allegation concerning the appropriateness of the unit covered by the contract; nor is there a prayer, express or implied, that the plaintiff union (let alone the plaintiff trust funds) be given representative status over any employees. Indeed, while we need not go beyond the complaint at this stage, petitioners admit that "Pratt-Farnsworth is a signatory to [the] contracts" which are

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[4] Therefore, it has been recognized from the beginning that an employer can defend against a § 8(a)(5) charge by showing that the Board has erred in determining that the unit which is certified is an appropriate unit. (See *Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146.)

the subject of this action. (Pet. 4). And petitioners make no showing that it is necessary to decide any unit issue to establish that Pratt-Farnsworth violated the contract by creating its alleged alter ego Halmar in order to evade its contractual obligations. Pratt-Farnsworth nevertheless asserts that the district court is without jurisdiction to adjudicate even the breach of contract claim against it.[5]

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[5] Petitioners also assert that the decision below is in conflict with decisions of other circuits. They rely most heavily on *Teamsters Local 70 v. California Consolidators, Inc.*, 693 F.2d 81 (C.A. 9) (hereafter "*Consolidators*"), which issued after the decision below. In *Consolidators* the union did not sue the corporation which was the signatory to the collective agreement (the equivalent of Pratt-Farnsworth in this case). Rather, the union sued only another corporation which was alleged to be a "single employer" with the signatory to the contract—*viz.*, the only defendant in that case was a corporation in the position of Halmar in this case. The Ninth Circuit held:

> Local 70 sought a declaration that Consolidators was bound to the collective bargaining agreement signed by Marathon, not merely that the companies constituted a single employer. *If the complaint had stated an actual controversy and requested declaratory relief that the companies were a single employer, the court would have had jurisdiction to determine it.* Instead, it sought relief that would require the court to decide the appropriateness of a bargaining unit, a representational question reserved in the first instance to the Board. [693 F.2d at 83-84, emphasis added, footnotes omitted.]

The present complaint, by contrast contains precisely the allegation which the Ninth Circuit in *Consolidators* held is within the district court's jurisdiction to decide. Moreover, as is clear from the first sentence of its opinion, the Ninth Circuit in *Consolidators* viewed the union's objective to be "to represent the employees at California Consolidators, Inc." (693 F.2d at 81). In the other two court of appeals' decisions with which petitioners assert a conflict of decisions (Pet. 13-17) the union also plainly sought to secure representation rights. Petitioners' own lack of confidence in their claim of a genuine intercircuit conflict is evidenced by their reliance on what is concededly "dicta" of another court (Pet. 18), on two decisions which (like *Peter Kiewit*, but unlike this case) arose on review of NLRB orders (Pet. 19) and two district court cases (*id.*).

The Court of Appeals recognized (690 F.2d at 523-525) that it may be unnecessary for the district court to make any determination with respect to the appropriate bargaining unit. Further, as the Court of Appeals explained (*id.* at 525) the nature of any unit issue will depend on whether the plaintiffs prove that Halmar is the alter ego of Pratt-Farnsworth, or only that the petitioners constitute a "single employer." Thus, the question of jurisdiction which petitioners would have this Court decide now would either be rendered wholly academic or considerably illuminated by the proceedings on remand directed by the court of appeals. To oust the district court of the jurisdiction granted by § 301 over contract claims by the mere assertion—on a motion to dismiss—that a bargaining unit issue is raised would undermine the Congressional policy favoring the enforcement of labor contracts.[6]

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[6] As the court of appeals cogently observed (690 F.2d at 518):

> We have seen that in deciding whether a collective bargaining agreement has been breached, the federal courts have been directed by Congress to create a federal common law of contract, fashioned from the policy of our national labor laws, applicable to collective bargaining agreements. [*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457]. We are faced here with one of the most fundamental questions that can arise in a contract suit, namely: who is bound by this contract? To say that the courts and not the Board are solely entitled to pass upon contractual disputes and at the same time to deny the courts the power to determine in a fashion consistent with the policy of our national labor laws the identity of the persons or entities obligated by the contract is self-contradictory. If anything, the power to enforce a contract must necessarily include the ability to decide who is bound by the contract. No question is more basic to the existence of contractual rights. Thus to the extent that the identity of the obligees is bound up in representational issues, the federal courts must be empowered to decide those issues for the purpose of determining contractual rights and obligations.

B. Question III Presented By Petitioners Does Not Warrant This Court's Review.

Petitioners' third question presented challenges the court of appeals' ruling "that even though the unions failed to attempt to exhaust grievance and arbitration procedures, the lawsuit should not be dismissed as it is not clear whether or not these procedures were mandatory." (Pet. 19, citing 690 F. 2d at 528.) Petitioners' claim of error in this respect is utterly unworthy of review by this Court.

Once again, it is essential to keep in mind just what the court of appeals did and did not decide in the ruling which petitioners challenge. Petitioners had submitted to the trial court selected pages from the agreement between the respondent unions and Pratt-Farnsworth, together with an affidavit of the latter's president to the effect that the unions had not brought or attempted to bring a grievance on the matters that are the subject of this lawsuit. (See 690 F.2d at 527-528.) While the district court gave the failure to exhaust as an alternative ground for dismissal of the complaint, the court of appeals concluded that "such a holding was premature." (690 F.2d at 528.)[7] The court of appeals noted that the petitioners had omitted to provide that article of the agreement which described the subjects which were excluded from the arbitration process, and observed further that other provisions of the agreement raised "questions of interpretation and possible waiver which we do not think were adequately addressed by the district court." (*Id.*) The court of appeals instructed the district court to "closely examine the language of the entire contract" and to "separate for purposes of analysis" the respondent unions' claims

[7] That court properly recognized that because the district court had considered matters outside the pleadings, the dismissal on this ground had to be viewed as the grant of a motion for summary judgment, which is proper only where there are no factual matters in dispute.

against each of the petitioners and the respondent-funds' claims against both petitioners. (*Id.*)

Petitioners do not profess disagreement with the court of appeals' determination that there was a legitimate dispute as to whether the collective agreement provided that the respective claims involved in this action were subject to the arbitration procedure, and if so, whether there was a waiver of that process by any of the defendants. Such a disagreement concerning the meaning of a particular contract would in no event warrant a writ of *certiorari*. Instead, petitioners assert as a matter of law that because the contract provides for a grievance and arbitration procedure, exhaustion of that procedure is a pre-condition to suit without regard to whether the particular claim sued upon is subject to arbitration. That contention derives no support from the decisions with which petitioners assert a conflict.

Petitioners rely most heavily on *Republic Steel Corp. v. Maddox*, 379 U.S. 650. (Pet. i, 20-21.) *Maddox* came to this Court after a full trial. The agreement expressly provided for a three-step grievance procedure to be followed by binding arbitration which dealt with the precise controversy concerning which the employee sought to bring suit (see 379 U.S. at 651, text and note at n.1), and provided further that the arbitration remedy thus provided was to be exclusive (*id.* at 657, 659). The decision below is entirely consistent with the holding of *Maddox*.[8]

There is, of course, no rule of law which provides that if a collective agreement contains an arbitration clause,

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[8] In their question presented (Pet. i) but not in the body of their argument, petitioners rely also on *Vaca v. Sipes*, 386 U.S. 171. But insofar as *Vaca* deals with the requirement of exhaustion, that decision merely follows *Maddox*. (*Id.* at 184.) Indeed, it was not disputed there that the plaintiff-employee's unlawful discharge claim in *Vaca* was subject to the grievance-arbitration procedure.

all disputes arising under the agreement are arbitrable. As this Court has repeatedly emphasized, arbitration is a matter of contract. (See, *e.g.*, *Steelworkers v. Warriors & Gulf Nav. Co.*, 363 U.S. 574, 582; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241-245; *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546; *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374.) Whether a particular dispute is arbitrable is very much a matter of interpretation of the agreement. (Compare *Atkinson*, *supra* with *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 256-260.) The decision below remanding on the exhaustion issue merely determined that the meaning of *this* agreement's arbitration clause is ambiguous on the record here and that a summary judgment on the ground that exhaustion is required should not have been granted. That approach is entirely in accord with the principles declared by this Court.

C. Question IV Presented By Petitioners Is Not Worthy Of This Court's Review.

Petitioners' fourth question presented challenges the court of appeals' ruling that the complaint herein states a cause of action under the antitrust laws. (Pet. 21-28). Here again, the court of appeals did *not* decide the case on the merits against petitioners, but only reinstated the the complaint which had been dismissed by the district court. In rejecting the contention, renewed by petitioners here, that their alleged conduct is by reason of the labor laws exempt from the antitrust laws, the court of appeals quoted with approval the views of the Ninth Circuit in *California State Council of Carpenters v. Associated General Contractors, Inc.*, 648 F.2d 527, 534: "*A fortiori*, if the statutory exemption is inapplicable to business group conspiracies involving unions, the exemption cannot be read to immunize anti-competitive conduct on the part of employers acting alone." (See 690 F.2d at 531.) Subsequent to the decision below, this Court reversed the Ninth Circuit's decision in *Associated General Contractors* on the ground that the complaint in that case did not

sufficiently allege that the plaintiff unions were "injured in [their] business or property by reason of anything forbidden in the antitrust laws" to recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. (*Associated General Contractors of California v. California State Council of Carpenters*, — U.S. —, 51 L.W. 4139 (Feb. 22, 1983).)

(i) This Court's *Associated General Contractors* decision does *not* undermine the court of appeals' decision in this case, because *that court did not decide the standing issue, but instead carefully reserved that issue for consideration by the district court on remand.* (690 F.2d at 535-536.) Indeed, the court of appeals expressed agreement with the analysis of the "standing" issue offered by Judge Sneed's dissent in the Ninth Circuit in *Associated General Contractors*:

> Although our understanding of the rationale behind *Connell* [see p. 14 *infra*] leads us ineluctably to the conclusion that a cause of action exists, we are in agreement that the issues regarding standing are conceptually distinct. As the standing issue has been neither addressed nor briefed by either of the parties, we think it wise simply to direct it to the district court's attention on remand, so that the court can determine which of the Unions or Funds are proper parties to this case after full development of the factual and legal issues by the parties. [690 F.2d at 536.]

In remanding, the court of appeals "direct[ed] the district court to consider the effect of our decision in *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976), and the Supreme Court's most recent pronouncement in the area, *Blue Shield v. McReady*, —— U.S. ——, 102 S.Ct. 2540, 73 L.Ed.2d (149 (1982)" (690 F.2d at 536, n. 27). In the course of that footnote the court of appeals discussed *Tugboat* and *McReady* and recalled that in *Tugboat* the Fifth Circuit had "specifi-

cally refused to endorse the broad holding of the Third Circuit in *Int'l Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, Inc.*, 483 F.2d 384 (3d Cir. 1973), *modified* 494 F.2d 1353 (3d Cir. 1974), that union members possessed antitrust standing on the basis that they were employees of the contractors *against whom* the conspiracy was aimed." (690 F.2d at 536-537, n.27 emphasis in original.)

Of course, if this Court's decision and reasoning in *Associated General Contractors* are, to any extent, inconsistent with the court of appeals' directions on the standing issue, the district court must, on remand, comply with this Court's views. Given the interlocutory stage of the case, and the tentative nature of the court of appeals' instructions, it does not appear to us to be necessary that this Court grant *certiorari* on the standing issue (which petitioners have not sought) in order to accomplish this result. Nevertheless, in order to avoid any controversy over the proper course to be followed by the district court, we do not oppose a grant of *certiorari* and a remand that directs the court of appeals to instruct the district court to consider the issue of the plaintiffs' standing on the basis of *Associated General Contractors*.

(ii) Petitioners concede that on the merits the Fifth Circuit agreed with their "basic rationale" concerning the scope of the labor exemption. But petitioners contend that the court of appeals "misapplied" that basic rationale by analyzing "the pleadings as somehow alleging a concerted refusal to deal not with the unions themselves, but with other contractors who hire union workers, or to allege a concerted refusal to deal with contractors who did not create 'double-breasted' union-nonunion arrangements." (Pet. 24.) It should go without saying that only the most extraordinary circumstances, not asserted to be present here, would justify review *at an interlocutory stage* of a court of appeals' interpretation of a complaint, as opposed to the complaint's legal sufficiency as so in-

terpreted. Moreover, it is petitioners, not the court of appeals, who have misread the complaint.

Having carefully approved dismissal of those portions of the complaint which "allege merely a concerted refusal to deal with the unions in an attempt to restrain competition in wages and working conditions," the court of appeals, properly construing the complaint "liberally" (690 F.2d at 534 citing *McLain v. Real Estate Board, Inc.*, 444 U.S. 232), continued:

> Closer inspection of the pleadings reveals two theories which do allege anticompetitive effects outside of the labor market *per se*. The first is that defendants have engaged in a concerted refusal to deal not with the Unions themselves, but with other contractors who hire union workers. The second involves a concerted refusal to deal with contractors who do not create "double breasted" union-non-union arrangements. [690 F.2d at 534.]

Accordingly, that court concluded that the complaint alleged agreements which were non-exempt on the authority of *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616. (See 690 F.2d at 534-535.) Petitioners object not to the court of appeals' understanding of *Connell*, but to its interpretation of the pleadings (Pet. 24); they assert that "the agreement in question [here] is a typical collective bargaining agreement negotiated at arm's length between a council of unions and an employer association. It contains no illegal provisions such as those found in *Connell*." (Pet. 27.) In so arguing, petitioners simply refuse to face up to the court of appeals' careful description of the complaint, for example, § 10(b) thereof, discussed at 690 F.2d 534.

If, notwithstanding this Court's ruling in *Associated General Contractors*, respondents establish on the remand already ordered by the court of appeals that they have standing, and *if* respondents prove the allegations of the complaint that provided the basis of the court of appeals'

determination that a cause of action is stated, the petitioners may ultimately be able to present an antitrust labor exemption issue warranting this Court's review. At present, however, they are merely engaged in a futile quarrel with the court of appeals as to the *meaning of the complaint.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be (1) denied in full; or (2) granted for the limited purpose of vacating the judgment of the court of appeals for further consideration in light of *Associated General Contractors of California v. California State Council of Carpenters*, —— U.S. ——, 51 L.W. 4139 (Fed. 22, 1983), see p. 13, *supra*.

Respectfully submitted,

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No. 82-1414

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRATT-FARNSWORTH, INC., ET AL., PETITIONERS

v.

CARPENTERS LOCAL UNION NO. 1846, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether, in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to remedy an alleged breach of a collective bargaining agreement, a federal district court may decide whether a unit is appropriate for collective bargaining where determination of that issue is necessary to a resolution of the contract claim and there is no assured procedure for obtaining a National Labor Relations Board determination of the issue.

2. Whether the court of appeals properly remanded for further proceedings the issue of whether the plaintiffs were required to exhaust the contract grievance and arbitration procedures before bringing suit.

3. Whether the complaint states a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1, insofar as it alleges that certain contractors have engaged in a concerted refusal to deal with other contractors who hire union workers or who do not create "double breasted" union-nonunion arrangements.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1414

PRATT-FARNSWORTH, INC., ET AL., PETITIONERS

v.

CARPENTERS LOCAL UNION NO. 1846, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A94) is reported at 690 F.2d 489. The opinion of the district court (Pet. App. C1-C32) is reported at 511 F. Supp. 509.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1982. A petition for rehearing was

denied on January 5, 1983 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth at Pet. App. D1-D7.

STATEMENT

1. Petitioner Pratt-Farnsworth, Inc. ("Farnsworth") is a construction company in the New Orleans area and a member of petitioner Associated General Contractors of Louisiana, Inc., New Orleans District ("AGC-New Orleans"). Petitioner Halmar, Inc. ("Halmar") is also a construction company in the New Orleans area and a member of petitioner Associated General Contractors of Louisiana, Inc., At Large District ("AGC-At Large"). AGC-New Orleans negotiated a collective bargaining agreement ("the Craft Agreement") for a multiemployer bargaining unit with the Carpenters District Council of New Orleans and Vicinity. Farnsworth is a signatory to this agreement. (Pet. App. E4-E5.)[1]

Respondents—two local unions which are members of the Carpenters District Council ("the Unions") and three employee benefit funds ("the Funds") to which the agreement obligates a signatory employer to make contributions—brought suit against Farnsworth, Halmar and the two AGC branches in the United States District Court for the Eastern District

[1] "Pet. App. E" references are to the allegations of the complaint, which must be accepted as true at this stage of the case since the district court granted petitioners' motion to dismiss the complaint (Pet. App. C32).

of Louisiana, alleging causes of action under Section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 185(a); the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1001-1361; and the Sherman and Clayton Antitrust Acts, 15 U.S.C. 1-7 and 12-27 (Pet. App. E3). The gravamen of the Section 301 and ERISA claims is that Farnsworth and Halmar are "a single integrated business enterprise" with "common ownership and management, centralized control of labor relations, sharing of equipment and other assets, and employees" (Pet. App. E4 ¶ 5); that, during the term of the Craft Agreement, "Farnsworth conspired with the knowledge and assent of the AGC and unknown labor persuaders * * * to establish and operate Halmar in order to circumvent and evade the Craft Agreement provisions and create a union-free environment" (*id.* at E6 ¶ 9); and that Farnsworth and Halmar thus failed to abide by the terms of the Craft Agreement, including the obligation to submit fringe benefit contributions on behalf of their employees to the Funds (*id.* at E9-E10).

The antitrust claim, insofar as relevant here, is that Farnsworth, Halmar and the two AGC branches have conspired (Pet. App. E6 ¶ 10(b)):

> To eliminate the [Unions] from the building and construction industry in New Orleans and vicinity by entering into agreements with owners and builders, whereby such owners and builders utilize contractors who do not have agreements with the [Unions].

The complaint requested, *inter alia*, that the Unions and the Funds be awarded treble damages for the antitrust violations (Pet. App. E11 ¶ 3), and that Farnsworth, Halmar and the two AGC branches be

ordered (1) "to abide by the terms and conditions of the Craft Agreement retroactively from May 1, 1971, to date, and any amendments, modifications or extensions and any new agreements entered into [with] the A.G.C." (*id.* at E12 ¶ 9), and (2) to pay to the trustees of the Funds the full amount determined to be due and owing for the period May 1, 1971 to date (*id.* at E12-E13 ¶¶ 10, 12).

2. The district court granted the defendants' motions to dismiss the complaint (Pet. App. C1-C32). It held that AGC-New Orleans and AGC-At Large were not proper defendants to the Section 301 and ERISA claims because they had never signed the collective bargaining agreement with the Unions (Pet. App. C5-C7). The court dismissed the Section 301 and ERISA claims against Farnsworth on the ground that the plaintiffs had never alleged any breach of the collective bargaining agreement on the part of Farnsworth in regard to its own employees (Pet. App. C13).

As to Halmar, the court dismissed the Section 301 and ERISA claims on the ground that it had no authority to determine that Farnsworth and Halmar were a single employer or alter egos without also determining the appropriate bargaining unit of their employees, which, it held, would be an impermissible invasion of the jurisdiction of the NLRB (Pet. App. C7-C10, C12-C14). Additionally, the court held that dismissal of the Section 301 and ERISA claims as to all defendants was required because of the plaintiffs' failure to exhaust the contractual grievance procedures provided in the collective bargaining agreement (Pet. App. C10-C12, C14).

Finally, the district court dismissed the antitrust allegations because it decided that the bargaining agreement fell within certain nonstatutory exemptions

to the antitrust laws, and that the plaintiffs' causes of action were in reality labor law issues parading as antitrust claims (Pet. App. C14-C32).

3. a. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A94). The court agreed with the district court that the absence of a contractual relationship between AGC-New Orleans or AGC-At Large and the Unions requires dismissal of the Section 301 claim against the two AGC defendants (Pet. App. A9-A14). It held, however, that the district court had improperly dismissed the Section 301 claims against Farnsworth and Halmar.

As to Farnsworth, the court of appeals concluded that the plaintiffs' claim for relief was sufficient to afford them "an opportunity to prove that Farnsworth refused to pay contributions on behalf of those employees who no one contests are Farnsworth's own" (Pet. App. A15). As to Halmar, the court acknowledged that the problem was more difficult since "Halmar never signed the collective bargaining agreement; therefore, unless the plaintiffs can establish an alternative ground for holding Halmar to the agreement, Halmar must be treated the same as the nonsignatory AGC defendants" (*ibid.*). The court concluded that the plaintiffs' complaint could be read as stating a claim under Section 301 against Halmar for breach of the collective bargaining agreement on the basis of either "the single employer theory or the alter ego theory developed by the Board in unfair labor practice cases under the NLRA" (Pet. App. A18).[2]

The court of appeals then considered the question whether a district court, in an action for breach of

[2] The court also concluded that plaintiffs had stated a claim under ERISA on the same two theories (Pet. App. A69-A70).

contract under Section 301 in which single employer or alter ego status was alleged as a basis for recovery, would be empowered to determine the appropriateness of the bargaining unit.[3] It concluded that the district court had such authority, rejecting the contention that a unit determination by the district court would be an invasion of the exclusive jurisdiction of the NLRB and contrary to this Court's decision in *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800 (1976) (*"Peter Kiewit"*).[4] (Pet. App. A32-A58.)

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[3] The court noted that a "finding of single employer status does not by itself mean that all the subentities comprising the single employer will be held bound by a contract signed only by one. Instead, having found that two employers constitute a single employer for purposes of the NLRA, the Board then goes on to make a further determination whether the employees of both constitute an appropriate bargaining unit" (Pet. App. A20). In making the latter determination, the Board focuses on the "community of interests" of the employees involved (*id.* at A20-A21). On the other hand, "the focus of the alter ego doctrine * * * is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations" (*id.* at A26). When "the Board makes a finding that a non-signatory employer is the alter ego of a signatory employer which has voluntarily agreed to recognize the union's representative status in a unit stipulated in the collective bargaining agreement, the Board generally will not reconsider the unit under the community of interests test, but will simply make a far more limited determination whether the stipulated unit is repugnant to any policy embodied in the NLRA" (*id.* at A28).

[4] In *Peter Kiewit*, the union had filed an unfair labor practice charge with the Board against a union contractor and a non-union contractor, alleging that they were a single employer and that the contract entered into by the union con-

b. With regard to the district court's alternative ground for dismissal of the plaintiffs' Section 301 and ERISA claims—the failure of the Unions and the Funds to exhaust grievance procedures outlined in the collective bargaining agreement—the court of appeals concluded that the district court's failure to address the scope of the arbitration provisions of the agreement and the contract language regarding waiver, together with the incomplete nature of the record, made summary disposition inappropriate. Accordingly, the court of appeals remanded the exhaustion issue to the district court for further consideration. (Pet. App. A72-A75.)

c. As to the plaintiffs' antitrust claims, the court of appeals held that the defendants' alleged conduct was not protected by either the statutory or nonstatu-

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tractor was binding on the non-union contractor. The Board found that the two contractors were separate employers and dismissed the complaint. The District of Columbia Circuit reversed, holding that the two contractors were a single employer. Rather than remanding for a determination by the Board on the appropriateness of the bargaining unit, the court further held that the contract unit was also appropriate for the non-union contractors' employees and that the two contractors had therefore committed an unfair labor practice by refusing to recognize the union as the representative of the non-union contractor's employees or to extend to them the terms of the collective bargaining agreement. This Court affirmed the court's determination on the single employer issue but vacated its holding that the employees of the two companies constituted an appropriate bargaining unit. The Court held that, "[s]ince the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed,' * * * we think the function of the Court of Appeals ended when the Board's error on the 'employer' issue was 'laid bare.'" *Peter Kiewit, supra*, 425 U.S. at 805-806.

tory labor exemptions to the antitrust laws (Pet. App. A78-A80). While finding that "most of the plaintiffs' antitrust pleadings clearly do not allege antitrust injury," the court further found that "[c]loser inspection of the pleadings reveals two theories which do allege anticompetitive effects outside of the labor market *per se*" (*id.* at A86). The court explained (*ibid.*):

> The first [theory] is that defendants have engaged in a concerted refusal to deal not with the Unions themselves, but with other contractors who hire union workers. The second involves a concerted refusal to deal with contractors who do not create "double breasted" union-non-union arrangements.

The court cautioned, however, that its holding that "a cause of action exists under the antitrust laws because of restraints at the level of contractor services * * * does not necessarily point to the Unions or the Funds as the natural plaintiffs who are entitled to bring that cause of action" (Pet. App. A90). Because the standing issue had "neither [been] addressed nor briefed by either of the parties," the court directed it "to the district court's attention on remand, so that the court can determine which of the Unions or Funds are proper parties to this case after full development of the factual and legal issues by the parties" (*id.* at A91).

DISCUSSION

1. The first two questions presented by the petition (Pet. i) are essentially an attack on the holding of the court of appeals that, in the "narrow set of circumstances in which neither side has sought to invoke the Board's powers to determine an appropriate bar-

gaining unit, and a federal court is called upon to remedy an alleged breach of contract, * * * the district court may decide the appropriateness of the bargaining unit, where a decision on that issue is essential to a resolution of a breach of contract claim" (Pet. App. A48). As we shall explain, however, that holding is consistent with decisions of this Court regarding the scope of a court's jurisdiction under Section 301 of the LMRA and the law to be applied in such suits. Moreover, as we shall further explain, the position taken by the court of appeals is especially justified where, as appears to be the case here, a Section 8(f) (29 U.S.C. 158(f)) construction industry prehire agreement is involved, because there is no easy or obvious way to obtain Board resolution of the unit question in such cases. In any event, we submit that review of this issue would be premature because it is unclear at this stage of the proceedings whether, or to what extent, the district court would be required to make a unit determination.

a. As the court of appeals noted, Congress directed the courts in Section 301 suits "to create a federal common law of contract, fashioned from the policy of our national labor laws, applicable to collective bargaining agreements" (Pet. App. A49, citing *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957)). The court added (Pet. App. A49):

> We are faced here with one of the most fundamental questions that can arise in a contract suit, namely: who is bound by this contract? To say that the courts and not the Board are solely entitled to pass upon contractual disputes and at the same time to deny the courts the power to determine in a fashion consistent with the policy of our national labor laws the identity of the par-

sons or entities obligated by the contract is self-contradictory. If anything, the power to enforce a contract must necessarily include the ability to decide who is bound by the contract. No question is more basic to the existence of contractual rights.

The court of appeals' conclusion that unit determinations may be made by federal district courts in Section 301 actions is consistent with *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). There, this Court held that a district court has jurisdiction to compel arbitration on the question of work assignments as between two unions, even though the resulting arbitration might touch upon representation matters that could be decided by the Board (*id.* at 268). The Court added that its recognition of the district court's power to make such a determination did not infringe upon the Board's paramount authority over representation matters: "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence" (*id.* at 272). See also *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975) (footnote omitted) ("federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws"); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-86 (1982) (same).[5]

[5] The court of appeals noted that "the analysis suggested by *Connell* is even stronger when claims are brought under ERISA. There can be no doubt that ERISA provides a remedial scheme independent of the NLRA. To the extent that collateral labor law issues arise in the course of an ERISA claim,

Nor is the decision of the court of appeals here contrary to that of this Court in *Peter Kiewit*. As the court of appeals correctly pointed out (Pet. App. A42), in holding that the D.C. Circuit erred in deciding a unit issue that had not previously been considered by the Board, this Court in *Peter Kiewit* "was applying a time-honored principle relating to appellate review of an agency determination." See, *e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). It was not addressing the very different question presented here, concerning the power of a district court in a Section 301 suit to make a unit determination where such a determination is necessary for the court to decide a contract issue that it is empowered to decide.

b. There is an additional consideration supporting the court of appeals' holding in this case. As the court noted (Pet. App. A94 corrected n.11), the doctrine of primary jurisdiction usually has no application where the plaintiffs could not invoke administrative action. See *Rosado* v. *Wyman*, 397 U.S. 397, 406 (1970). Board remedies are available to a union seeking to compel two companies to comply with terms of a Section 9(a) (29 U.S.C. 159(a)) agreement (*i.e.*, an agreement with a union that has majority support) where one of the companies has signed the agreement. In such a situation, the union, as in *Peter Kiewit*, can file a Section 8(a)(5) (29 U.S.C. 158(a)(5)) charge, and the Board can determine, first, whether the companies are alter egos or a single employer and, second, whether the unit is appropriate. In some cases, a certified or currently recognized col-

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the federal courts should be empowered to decide them" (Pet. App. A52-A53).

lective bargaining representative might also file a unit clarification petition in order to obtain a Board ruling on whether employees of the allegedly separate employer should be under the contract. See 29 C.F.R. 102.60(b).

But such measures are not available to a union operating under a "prehire agreement"—an agreement that, under Section 8(f) of the Act, construction industry employers may enter into with minority unions. A Section 8(a)(5) charge would be dismissed where the union was merely a party to a Section 8(f) agreement and made no claim that it had established its majority, because an employer is free to repudiate a Section 8(f) agreement prior to the establishment of a union's majority. *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 345 (1978) (*"Higdon Contracting Co."*). See also *Jim McNeff, Inc.* v. *Todd*, No. 81-2150 (Apr. 27, 1983), slip op. 8. Nor would a unit clarification proceeding be available, because such petitions are cognizable only if there is "no question concerning representation." 29 C.F.R. 101.17.

The present case appears to involve a Section 8(f) agreement, and no one claims that the agreement has been converted to a Section 9(a) agreement by the attainment of majority status.[6] Thus, it appears that

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[6] As the court of appeals noted (Pet. App. A59), petitioners implicitly contend (Pet. 5-6 & n.1) that the Unions have never demonstrated majority status so as to convert the agreement into a Section 9(a) agreement. The Unions made no allegation of majority status in their complaint (Pet. App. E1-E14). Nor is it clear in this case whether, even assuming the Unions had demonstrated a majority at some time in the past, such a majority would continue to apply. When employees represent a relatively stable complement, a union that establishes a majority is thereafter entitled to a continuing presumption of majority on other construction projects undertaken by the

the unit appropriateness question could not readily be resolved through a Board unfair labor practice proceeding initiated by Section 8(a)(5) charges or through a unit clarification proceeding under Section 9(b) (29 U.S.C. 159(b)) of the Act.

c. In contrast to this case, none of the three decisions relied on by petitioners for a conflict in the circuits (Pet. 13-17) is a construction industry case. *Brotherhood of Teamsters Local No. 70* v. *California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982) (trucking company); *Local No. 3-193, Int'l Woodworkers* v. *Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) (timber industry); *Local Union No. 204, IBEW* v. *Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982) (electric utility). Although the court in each case concluded that, under *Peter Kiewit*, bargaining unit determinations should be left for the Board, none of the three panels was faced with a situation in which, as appears to be true here, the Board would not be able to make such a determination. Moreover, two of the cases are distinguishable on additional grounds. As the court below noted (Pet. App. A46-A47 n.12), the court in *Iowa Electric* viewed the union's Section 301 suit as a means of obtaining review of a representation issue that had already been passed on by the Board (668 F.2d at 419-420).[7] Similarly, as the court of appeals also noted

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employer. *Hageman Underground Construction*, 253 N.L.R.B. 60, 62 n.7 (1980). But, if the employer hires its employees on a project-by-project basis, and the composition of the workforce changes, the union must prove a majority on each project in order to make the contract immune to subsequent employer repudiation. *Ibid.*, citing *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977).

[7] In *Iowa Electric*, a dispute arose between the union and the employer over accretion of Quality Control Inspectors

(Pet. App. A54-A55), although the Ninth Circuit in *Ketchikan* stated that a court in a Section 301 suit lacks jurisdiction to enforce an accretion clause in an agreement (611 F.2d at 1299-1300), the court in that case in fact proceeded to declare—in a de facto ruling on the merits—that such an accretion clause would be unenforceable as applied to employees in the logging camps to which the union sought to extend the agreement (*id.* at 1301).

d. Finally, we believe that review of this case in its present interlocutory stage would be premature because the issue is not defined as well as it might be following the remand. The court of appeals instructed the district court on remand to apply the Board's approach in determining the appropriate bargaining unit (Pet. App. A66-A67). As the court of appeals explained (*id.* at A66), however, it is unclear at this point whether the Unions and the Funds would be able to establish that Halmar is an alter ego of Farnsworth; if they *do* establish alter ego status, then the district court's unit determination would be a very limited one. The Board does not undertake an independent community-of-interests inquiry—its standard test for the appropriateness of a bargaining unit—where alter ego employers are involved; rather, the Board limits its inquiry in those situations to whether

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("QCI's") into a contractually defined bargaining unit. The employer contended that QCI's were managerial or supervisory personnel not includable within the bargaining unit for "employees." The union filed an election petition with the Board, which upheld the union's position that the QCI's were employees, and the union was eventually certified as the bargaining representative for the QCI's. The employer then refused to bargain with the union, and the union, instead of filing a Section 8(a)(5) charge with the Board, brought a Section 301 action in federal court.

the contractual unit is repugnant to the policies of the Act. *Hageman Underground Construction*, 253 N.L.R.B. 60, 70 & n.12 (1980). See also *Young's Metal Fabricators & Roofing, Inc.*, 241 N.L.R.B. 978, 980, 983 (1979) (summary finding of unit appropriateness in alter ego case); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144, 1151 (1976) (same).[8] Thus, it is as yet unclear whether the district court will be called upon to apply a unit test that implicates Board expertise to a greater degree than does the limited test applied in alter ego cases. Of course, if the district court finds that both the single employer *and* the alter ego allegations are unsupported, there would be no reason for the court to make *any* kind of unit determination.[9]

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[8] But see *Air-Vac Industries, Inc.*, 259 N.L.R.B. 336 (1981), in which the ALJ analyzed the appropriateness of the contractual unit under the community of interests test (*id.* at 340), although determining that the employer was both an alter ego of, *and* a single employer with, the signatory employer. *Id.* at 341.

The Board's broad deference to a contractually stipulated unit in alter ego cases is an application of the general rule that, when a union and an employer have agreed upon a particular unit, the Board will not disturb that agreement unless important policy reasons under the Act absolutely preclude such a unit. *The Tribune Co.*, 190 N.L.R.B. 398 (1971). Accord: *Mid-Jefferson County Hospital*, 259 N.L.R.B. 831 (1981). See also cases cited at Pet. App. A64-A65 n.17.

[9] Respondents, however, are wrong in suggesting (Br. in Opp. 6) that a court could enforce a prehire agreement in a Section 301 suit without reference to whether the bargaining unit as to which the agreement is enforced is one that contravenes policies of the National Labor Relations Act. Just as this Court in *Jim McNeff, Inc.* v. *Todd*, *supra*, examined the policies of the Act to ensure that none was violated by affirmance of the judgment enforcing the prehire agreement as to

The remaining questions presented in the petition likewise do not warrant review by this Court.

2. Contrary to petitioners' contention, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), does not stand for the proposition that "a prerequisite to a § 301 suit is an attempt to exhaust any existing grievance or arbitration procedure, whether mandatory or permissive" (Pet. 20-21). In *Maddox*, the Court specifically stated that a court suit would not be precluded "if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy." 379 U.S. at 657-658 (footnote omitted). Whether a particular dispute is subject to resolution under the contract grievance and arbitration procedure, and, if so, whether the parties intended arbitration to be an exclusive remedy, are matters of contract interpretation. In remanding on the exhaustion issue, the court of appeals merely determined that the meaning of *this* agreement's arbitration clause is ambiguous on the record here and that the district court therefore should not have granted summary judgment on the ground that exhaustion is required (Pet. App. A72-A73). The exhaustion issue is thus not ripe for review.

3. a. Petitioners, of course, do not contest the court of appeals' holding (Pet. App. A86) that most of their alleged efforts to encourage open shops and double-breasting are not actionable under the antitrust laws (see Pet. 24). Cf. *Associated General Contractors* v. *Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 7-8 ("*AGC*"). Petitioners do contend (Pet.

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the matters in question, so here it was proper for the court of appeals to direct the district court to consider the unit question *if* it finds that Farnsworth and Halmar either constitute a single employer or are alter egos.

24-25), however, that the court erred in holding that the complaint alleges an anti-competitive restraint in the market for carpentry subcontracting services, in violation of Section 1 of the Sherman Act.

Petitioners' argument rests in large part on their disagreement with the court of appeals' interpretation of the complaint as alleging an employer boycott of contractors who hire union workers and of contractors who do not create double-breasted union-nonunion operations (Pet. App. A86). There may be some merit to petitioners' claim that the complaint does not allege such a boycott. Paragraph 10(b) of the complaint, on which the court of appeals relied (Pet. App. A87), is "both brief and vague." *AGC*, slip op. 3. It does not in so many words allege a boycott or a concerted refusal to deal with unionized contractors (see Pet. App. E6). Nor does the complaint contain allegations of "coercion" against unionized contractors that this Court in *AGC*, on a comparable complaint, held were important to a finding that the boycott there was adequately pleaded. *AGC*, slip op. 8-9. On the other hand, paragraph 10(b)'s allegation of the defendants' intent "[t]o eliminate" the union by signing agreements with builders to "utilize contractors who do not have [union] agreements" (Pet. App. E6) arguably may, under very liberal pleading rules, adequately allege an employer boycott (see Pet. App. A86-A89). Whatever the proper interpretation of the complaint, however, this fact-bound issue, which turns on the particular allegations in a single complaint, is of no general importance and clearly does not deserve plenary review.

b. Moreover, insofar as petitioners argue (Pet. 25-28) that, even if the complaint adequately alleges an employer boycott of other employers, it is nonetheless

beyond the reach of the antitrust laws because of the labor exemption, they are wrong.[10]

Petitioners rest their claim to the statutory labor exemption largely on Section 20 of the Clayton Act (29 U.S.C. 52), which states that no injunction "shall prohibit any person or persons, whether singly or in concert * * * from ceasing to patronize or to employ any party to [a labor] dispute." But this argument ignores the nature of the antitrust allegations at issue here. The persons whom petitioners are accused of boycotting are not parties to any labor dispute; they are firms excluded from the contracting market because they happen to adhere to union contracts. Neither Section 20, nor any other statutory provision, has ever sheltered such a boycott. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474-477 (1921); *American Medical Association* v. *United States*, 317 U.S. 519, 536 (1943).

Petitioners' reliance (Pet. 25) on *United States* v. *Hutcheson*, 312 U.S. 219 (1941), is misplaced, for the Court there held only that, under the Clayton and Norris-LaGuardia Acts, a unilateral secondary boycott by a union is exempt from the antitrust laws. The Court, moreover, defined the exemption as available to the union only "[s]o long as [it] acts in its self-interest and does not combine with non-labor groups." 312 U.S. at 232 (footnote omitted). Thus, in *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797 (1945), the Court held that, whatever ex-

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[10] The United States recently addressed this subject at substantial length in its *amicus curiae* brief in *Associated General Contractors* v. *Carpenters* (No. 81-334, 1981 Term), at 12-22. We repectfully refer the Court to that brief for a full statement of our position. (We are sending copies of our *amicus curiae* brief to the parties in this case.)

emption the union might enjoy acting alone, it could claim no such exemption when it aided and abetted business groups who were violating the Sherman Act through an anticompetitive agreement. The group of employers charged in this case with boycotting other businessmen is surely no more entitled to a labor exemption than either the union or the business groups in *Allen Bradley*. See *H. A. Artists & Associates* v. *Actors' Equity Association*, 451 U.S. 704, 717 n.20 (1981).

Petitioners' further contention (Pet. 27) that they are entitled to a nonstatutory labor exemption is also incorrect. As the Court explained in *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, *supra*, 421 U.S. at 622, this exemption is derived from the policy of the federal labor laws favoring collective bargaining and the association of employees to eliminate competition over wages and working conditions. That policy, however, clearly is not served by permitting employer groups to pressure other employers outside the bargaining unit to give their contracting business to nonunion firms and thereby drive local unionized firms out of a portion of the subcontracting market. Indeed, as the court of appeals pointed out (Pet. App. A89), in *Connell* the Court held (421 U.S. at 623-625) that a union's agreement with general contractors not to deal with nonunion subcontractors was an interference with the subcontracting market not protected by the labor exemption; a similar agreement by a group of employers can surely fare no better.[11]

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[11] *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), relied on by petitioners (Pet. 27-28), is inapposite. The Court there held that a provision of a collective bargaining contract that affected product mar-

c. Finally, as is true with regard to the other questions presented in the petition, consideration of the antitrust issue would be premature. The court of appeals in this case remanded the antitrust claims to the district court for a determination whether the plaintiffs have standing to pursue them (Pet. App. A91). The standing issue, which was not raised below and which is not included in the petition, may be dispositive of the plaintiffs' antitrust claims.

Even before this Court's decision in *AGC*, the court of appeals was skeptical of the plaintiffs' standing (Pet. App. A90-A91). The *AGC* decision casts further doubt on the plaintiffs' standing. In *AGC*, which was an antitrust cause of action very much like this one, the Court concluded that the union was not a person injured by reason of a violation of the antitrust laws. In so concluding, the Court stressed that a number of relevant factors "weigh[ed] heavily" against judicial enforcement of the union's antitrust claim: "the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy * * *." *AGC*, slip op. 27. Without prejudging the district court's inquiry, we would only note here that there is a very substantial question as to plaintiffs' standing to bring

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ket competition but also had an "immediate and direct" effect on the employees' hours of work was entitled to the labor exemption. But there is no basis in either the plurality opinion of Justice White or the concurring opinion of Justice Goldberg for providing a labor exemption to a boycott by one group of employers against another merely because it is motivated by anti-union animus.

their antitrust action. Should the lower courts rule in favor of the plaintiffs on the standing issue, there will then be time enough for petitioners to seek review of that and the other antitrust issues presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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